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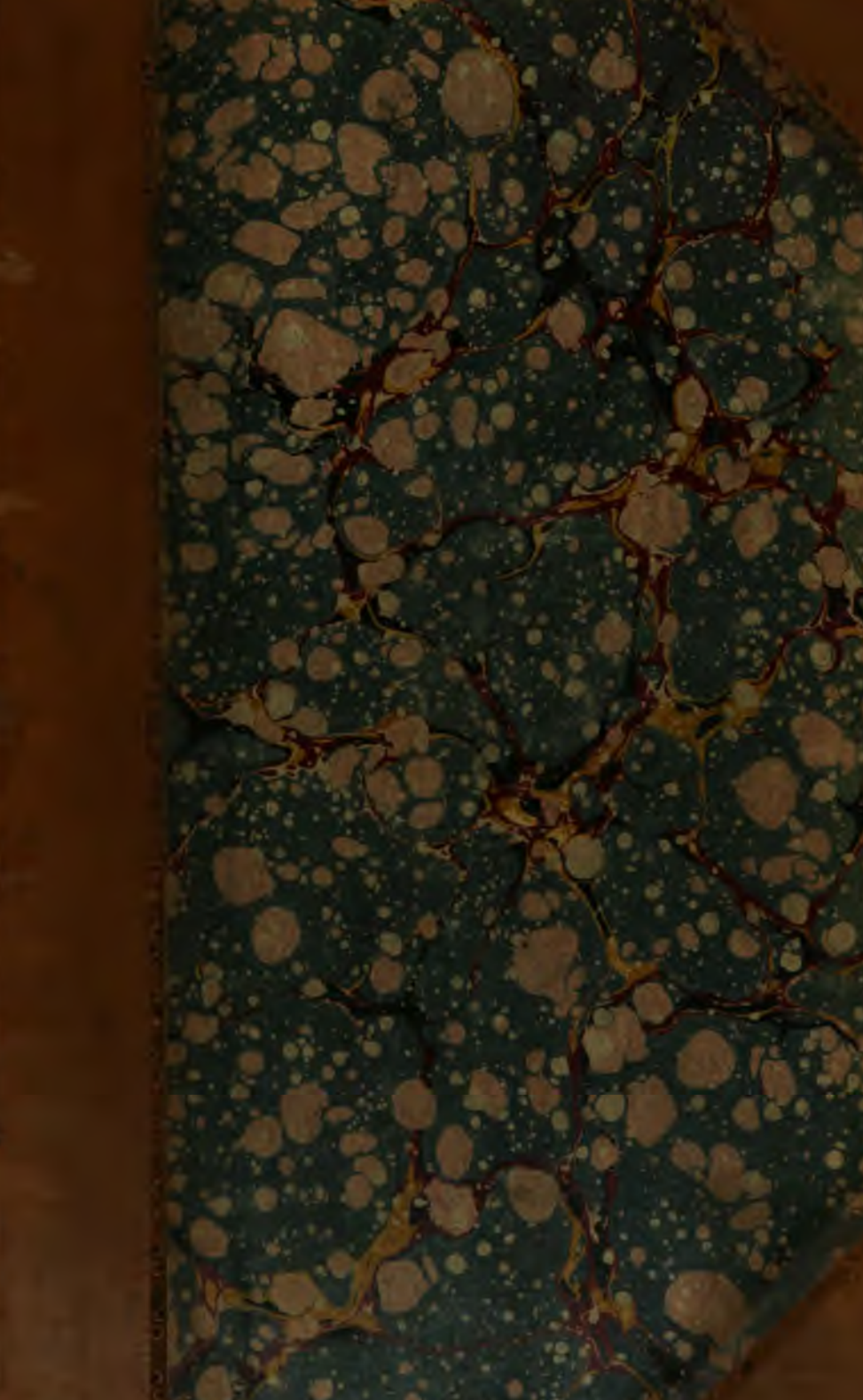
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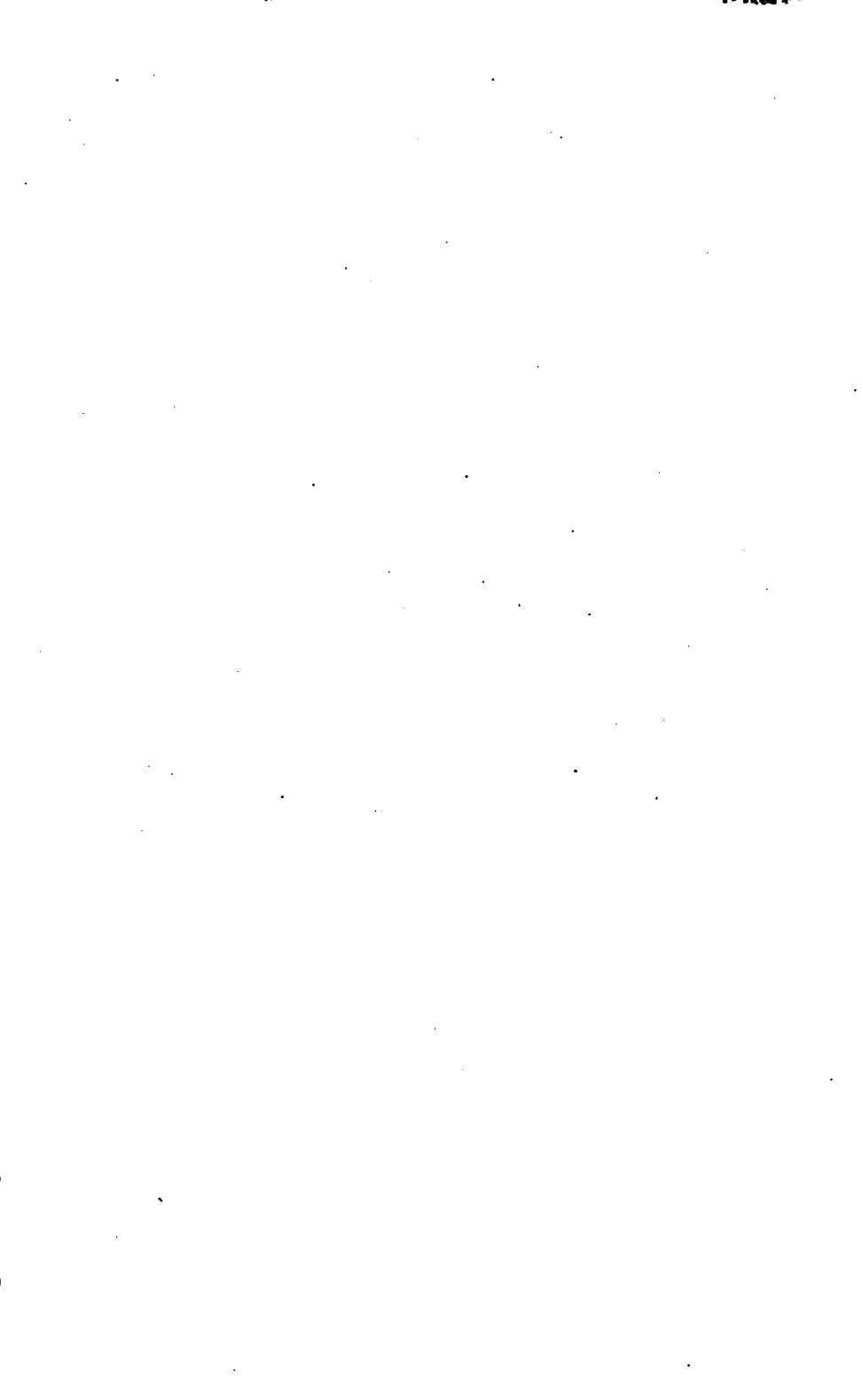
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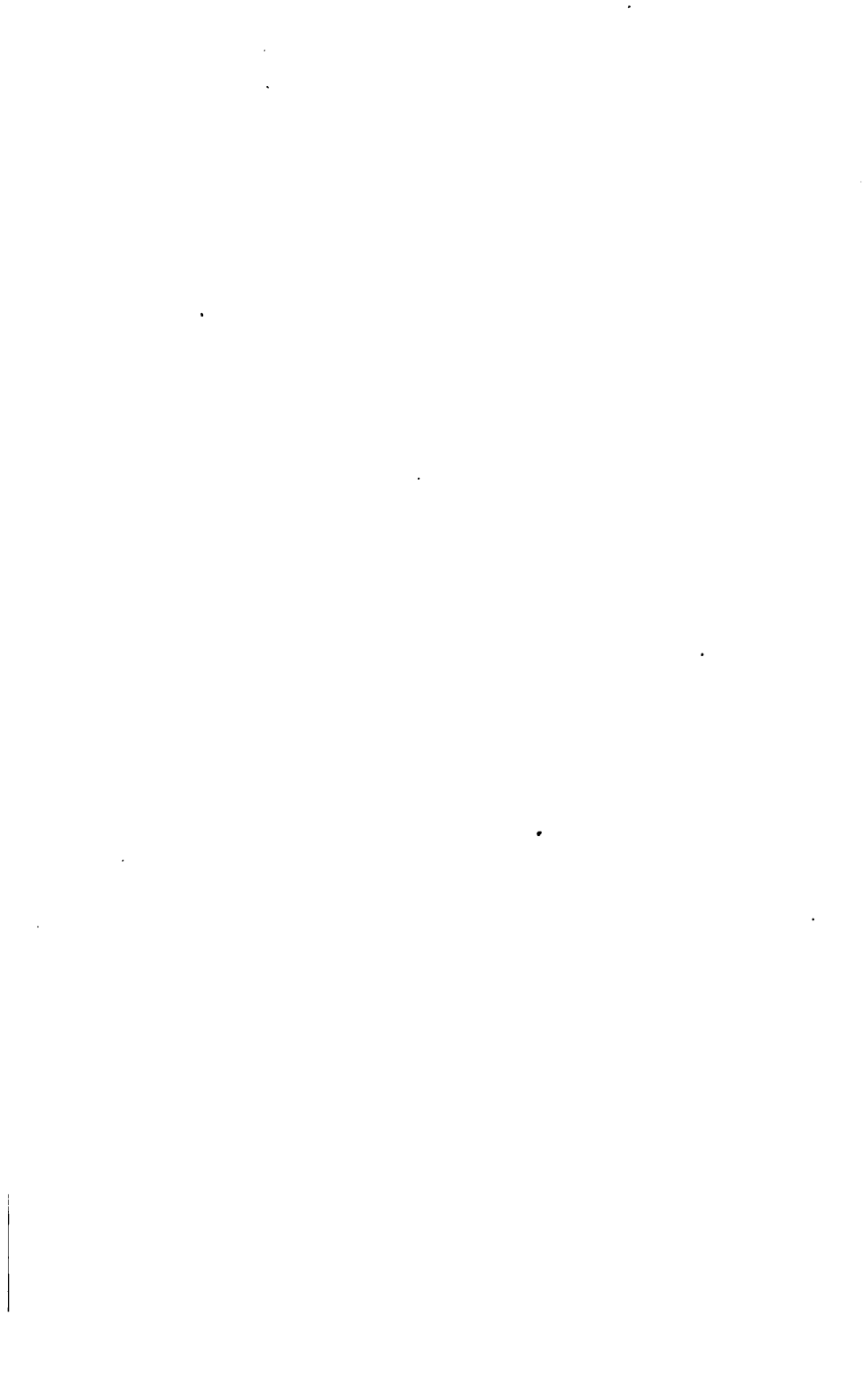
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Charles Wingate,
Solicitor, Stirling.
THE

JOURNAL OF JURISPRUDENCE

1884

VOL. XXVIII.

EDINBURGH

T. & T. CLARK, LAW BOOKSELLERS, GEORGE STREET

GLASGOW: THOMAS MURRAY AND SON; AND J. SMITH AND SON

ABERDEEN: WYLLIE AND SON

LONDON: STEVENS AND SONS

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THE JOURNAL OF JURISPRUDENCE.

A CHANCE FOR THE BAR.

THINGS are not going well with the Bar of Scotland. Not only is business steadily decreasing, but the College of Justice is losing that lofty position which at one time it occupied in the eyes of Scotland; and on this subject we intend to utter some few but plain words. To the majority of the Junior Bar, Lord Young is known merely as an accomplished lawyer, a merciful judge in the criminal court, a speaker whose very mannerisms are fascinating, and a man whose private life is adorned by many domestic virtues. They do not remember him as a law officer of the Crown, and know nothing of his intense unpopularity when in power as a member of Mr. Gladstone's last Administration. But he has bequeathed to the Bar a legacy which, if its effects were fully perceived, would make his name an object of peculiar dislike to those who are now entering on the profession of an advocate. We allude to the Law Agents Act of 1873. We do not for a moment doubt that many of those who have been admitted to practice as agents under that Act are men of the highest respectability and the most thorough capacity; but no one who has been, for any extended period of time, acquainted with the Parliament House, will deny that, on the whole, the class of agents has, since 1873, deteriorated in a marked and alarming degree.

With a few exceptions, the Writers to the Signet and Solicitors before the Supreme Courts were thoroughly responsible men, who were justly respected by the Bar, and in whose hands the interests of clients were perfectly safe. But now, under the new *régime*, there is an influx, yearly increasing, of men who, it is too well known, are needy and ignorant, ready to encourage litigation, and prepared to conduct lawsuits on the principle of "speculation." Not very long ago a young counsel received a written proposal from a law agent, that he should conduct cases in court, and trust for his remuneration to the result of the judgments,

receiving fees when successful, and none when the cases were lost. The man who made this proposal may be seen any day in the Parliament House, and his name appears almost weekly in the Calling Lists.

The effect on the Junior Bar of the new state of things is necessarily very bad; for it tends to encourage men of inferior qualifications to become advocates. No doubt from time immemorial men have raised themselves from a humble position in the social scale to the summit of the profession; and more than one example of this is to be found on the Bench at present. But hitherto the Bar has not been the happy hunting ground of those whose origin is such as to render them the intimate personal friends of second-rate agents and legal speculators. We fear that under the new system the social position of the Bar is sinking, and that, in the long run, the public will suffer severely by the change.

There is an enormous waste of energy on the floor of the Parliament House. Numbers of men who are perfectly able, as well as willing, to conduct business are doomed to years of dismal, inevitable idleness. Agents in the country are falling more than ever into the habit of "requesting" their correspondents in Edinburgh to employ certain counsel. The Edinburgh agents almost invariably do what they are told. With scarcely an exception, they have not the courage to say that they wish to employ counsel chosen by themselves; and the result is that the business of the Bar is concentrated in the hands of a few men. The consequence of this concentration of business is that the men into whose hands it falls have time for nothing else. They live a hard and toilsome life, full of honest labour, but ultimately productive of the worst results both to themselves and to the Bar of Scotland. The daily round of one of these legal slaves is from year's end to year's end the same; from ten in the morning till half-past three in the afternoon speaking and hurried reading; an afternoon of consultations or study; a couple of hours for dining and relaxation; the study at eight; and the evening's work. This goes on for fifteen or twenty years, and then the result is seen,—a man of great acquirements in the law, a nimble mind, a marvellous memory, great power of application, the most perfect self-denial, the most praiseworthy industry, the possessor of excellent claret, a model of respectability, a pattern of domestic virtue. But that is all; for his whole powers are concentrated in one narrow groove,—

Law only charms this legal swell :

A primrose by the river's brim

(See Wordsworth, case of *Peter Bell*) :

A primrose only is to him.

You talk about historic times,

The strife of Strafford, Hampden, Pym,

Of art, the last new poet's rhymes,—

A vacant stare's vouchsafed by him.

Of politics he knows but this,
 It does not pay to turn and trim ;
 Nor cares for them, but must not miss
 What prize may be in store for him.

This would be of little or no consequence if the Scotch Bar was merely a profession by which a livelihood was to be made ; but, in the history of Scotland, it once was something more. It was a noble calling, followed by men who led their countrymen in literature and in public life, who were ready to sacrifice much for the opportunity of being the representatives of the thought and culture of their day, and who therefore gave to the Bar of Scotland that position of influence and power which, we fear, it is destined soon to lose.

It was because the Bar was something more than a mere means of making money that so much public influence and so much political distinction fell into the hands of the Lord Advocates of Scotland. Before the Union, Hamilton, Hope, Stewart, and others, the leaders of the Bar, were also among the leaders of the people ; and after the Union, Duncan Forbes, Henry Dundas, and men whom many of us can remember, were able to maintain the rights and defend the interests of Scotland. But nowadays the mere lawyer, with all his estimable qualities of industry and respectability, is seldom of real service to the country, and injures the ancient prestige of the body to which he belongs. Mr. Omond's work on the *Lives of the Lord Advocates*, although tinged by too much of the spirit of party, clearly proves that the leading advocates of a former generation, both Whig and Tory, were thoroughly independent, and had none of that social diffidence or political indifference which is, we fear, too common at the present day. Forbes of Culloden opposed the Government to which he belonged, when he thought that it was unjust to Scotland ; while Sir William Rae and Mr. Maconochie threatened to resign if Ministers ventured to interfere with what they believed to be necessary for the public service.

The Scotch Bar has now a splendid, perhaps a last, chance afforded to it. It may never regain its lost place in literature, or its old title to be considered the centre of Scotch politics ; but it may show that its public spirit still survives, and that, when grave questions arise, affecting the rights of Scotchmen, it can make itself heard. We trust that, in the coming year, we shall hear nothing more of "Mr. Pliable," and that, without fear of consequences, all ranks of the profession will do their duty.

JURISDICTION OF THE COURT OF CHANCERY IN SCOTLAND.

A JUDGMENT has recently been pronounced by Lord Fraser in the case of *John Orr Ewing and Others v. Orr Ewing's Trustees*, which

is of the greatest importance to the public as well as the legal profession in Scotland. By it his Lordship has found and declared that the defenders, who are the testamentary trustees and executors of the will of the late Mr. John Orr Ewing, are bound to administer his estate and carry out the purposes of his trust settlement in Scotland, and under the authority of the Courts of Scotland alone, and are not entitled to render accounts to any foreign tribunal; and he has interdicted them from rendering any account of the estate, so far as situated in Scotland, to the Court of Chancery in England. It will be remembered that in the case raised in the Court of Chancery against the same defenders by an infant beneficiary in the estate suing by his "next friend," the Court of Appeal reversed the decision of Mr. Justice Manisty dismissing the suit, and held the trustees bound to account to the Court of Chancery for their administration of their trust. This judgment was recently affirmed by the House of Lords, and the effect of Lord Fraser's decision is therefore obviously seriously to interfere with operations and asserted jurisdiction of the Court of Chancery. It has, however, been very strongly felt in Scotland that that Court in extending its jurisdiction over us was attempting a most unwarranted and unjust aggression, and Lord Fraser's judgment has just come in time to appease in some measure the indignation with which the House of Lords' decision has been received here. The resulting conflict of jurisdictions is probably unprecedented in the history both of England and Scotland, certainly so in that of Great Britain. The difficulty is interesting to the lawyer as involving a pure question of international law—assuming the Court of Session and the Court of Chancery to have each decided correctly according to the municipal law of Scotland and England respectively. And the result is more than interesting to the people of Scotland, unless they are indifferent to the risk of having their estates thrown into Chancery.

Here, of course, the legal aspect of the question must chiefly occupy our attention, and in examining its merits it will be most convenient to deal with the various circumstances of the case in the order of time. The general question at issue is, In what country, Scotland or England, are the estates of a domiciled Scotsman to be administered, *i.e.* realized, managed, and divided, according to the provisions of his will? Mr. John Orr Ewing at the time of his death, on 15th April 1878, was domiciled in Scotland. He left a trust-disposition and settlement in the ordinary Scotch form, whereby he conveyed over to six persons—the defenders in both the actions we have referred to—his whole estates in trust, for payment of debts and distribution amongst legatees. He also appointed his trustees to be his executors, and they accepted office, gave up an inventory of the personal estate "situated in Scotland and England, amounting in value to £460,549, 10s. 4d.," and were duly confirmed executors by the Sheriff of Dumbartonshire,

within whose commissariat the deceased had his domicile at the time of his death. Of the sum contained in the inventory, there were £435,314 in Scotland, and £25,235 in England, and in order to obtain possession of this latter sum the executors proceeded to take out probate in England, or the equivalent provided by the Confirmation and Probate Act 1858, by causing the confirmation to be sealed with the seal of the principal registry of the Probate Division of the High Court of Justice in England. The statute declares that this proceeding shall have the like force and effect as if a probate or letters of administration had been granted by the Court of Probate in England, and the executors accordingly thereby became the legal personal representatives of the deceased in England, and entitled to uplift the personal estate in that country. This they accordingly proceeded to do, and the whole of the funds in England have long since been transferred to Scotland, and are held there by the executors along with the other estate of the deceased for the purposes of the trust. There were no creditors in England, and the executors were in course of discharging their official duties in the ordinary form known to Scottish law, *i.e.* through the intervention and management of the agents of the trust, when a writ was issued against them from the Court of Chancery in England at the instance of certain legatees suing, in respect they were still minors, by their next friend. The action was what is called an "administration" suit in England, the exact effect of which it would be as difficult as unprofitable to attempt to describe here. It is what is popularly known as "throwing into Chancery," and its effect would be most easily apprehended by the Scottish lawyer if he could imagine a multiplepounding without double distress, or the appointment of a judicial factor upon a testamentary trust, without any failure on the part of the trustees, or any cause for their removal being shown to the Court. Once instituted, the effect (barring the immensely cumbrous and slow procedure of all English Courts) seems to be very much like our action of multiplepounding, the chief distinction (and a very important one it is) being in the persons by whom, and the reasons for which, the procedure may be instituted in each country respectively. In England, the Courts assume the power of managing the estate, of superseding the trustees without removing them, at the mere request of any beneficiary—*ex debito justitiæ*, as they express the legal principle, or as it may be popularly translated—as a matter of course. Our Courts, on the other hand, will do nothing until satisfied of the absolute necessity for interference. Their policy has always been to leave people alone as much as possible, and only to step in when they can't agree, or when they really require to be protected. In England the theory is that the sovereign is the guardian of his people, and that the Chancellor in his place must protect his ward whenever protection is asked. We require, however, the need of

protection to be proved by the party applying for it. Whichever is the better principle in the earlier stages of a nation's life, experience shows that ours is more suited to the development of modern society. The scandalous suits which still tarnish the history of the Court of Chancery would be impossible with us. And though there may happen rare cases in which the difficulty of proving relevant allegations against a body of trustees may almost amount to a denial of justice, it seems better to trust to the influences of public opinion and education, which keep the vast majority of such persons in the straight path, than to hamper every man's will with the expense of a judicial administration of it. The present case is a striking instance of the abuses to which the English system is open. Certain nephews of Mr. Ewing, resident in England, were entitled to legacies and shares of residue of his estate in terms of his will. One of these, dying after his uncle, bequeathed £30,000 to his mother, and £10,000 to a Mr. George Wellesley Hope, a friend of his own, payable out of his share of his uncle's estate. Mr. Hope, it will be observed, had thus nothing to do with Mr. Ewing's estate directly, as his legacy fell, of course, to be paid out of the nephew's share of it, and by the representatives of the nephew, whoever they might be. Accordingly, in the course of the procedure which followed the service of the writ, Hope's name as well as the names of two other nephews of the testator whose names he had also used as plaintiffs, were struck out of the action, and it was allowed to proceed in the name of the testator's youngest nephew, Malcolm Hart Orr Ewing, by Mr. Hope as his next friend. Into the family history it is no business of ours to inquire further than is necessary to illustrate the facilities which the English procedure seems to afford for fomenting a family quarrel. Mr. Hope, the so-called next friend, is obviously the *fons et origo*. He sued first in his own name as well as in that of his young friends; and when some of them successfully repudiated his friendship, and had him struck out of the cause as a party in his own right, he succeeded in retaining a place in it as next friend of the youngest nephew, a half-brother of the others, and who lives with his mother separate from them and their father. We must, however, assume, since the proceedings have been adjudicated upon by the House of Lords, that things were done in accordance with English practice, and the result seems to be that so far as we can understand it, it is a very bad practice indeed. We need not detail here the progress of the cause, but proceed at once to say that in November last the House of Lords unanimously affirmed the judgment of the Court of Appeal in England, which had declared that the estate of Mr. Ewing ought to be administered under the English Courts, and ordered accounts to be rendered by his trustees accordingly. The trustees of course resisted the jurisdiction of the Court of Chancery. They were all along aware of the duty which they owed to the Scottish Courts, under whose

authority they acted, of accounting to them for the last penny of the estate, and of in the meantime discharging gratuitously and cheaply the duty of administering the estate according to Scotch law and the will of the testator. All this was ably pleaded for them by the Lord Advocate in the House of Lords, but in vain. The Chancellor evidently cannot appreciate the merits of our Scottish system of administration, and he is either ignorant of international law or refuses to be bound by it. Yet the fairness of the argument for the trustees is apparent the moment it is stated. According to international, *i.e.* according to every jural system except apparently the English, the Courts of the domicile of the deceased are the seat of the principal administration of his estate. There are what are called auxiliary administrations for the purpose of collecting assets in a foreign country, and paying creditors there. But the administrators in these countries are confined to these duties alone, and these performed, they must remit any surplus that may remain to the country of the principal administration for distribution according to the law of the domicile, either under the will or according to the rules of intestate succession. Applying these rules to the present case, Mr. Ewing's trustees were only auxiliary administrators in England, and had only a limited duty imposed upon them. And there being no creditors in England who could be prejudiced by the withdrawal to Scotland of the English estate, they were clearly only doing their duty in transferring it to Scotland for the purpose of distribution. The English probate or its equivalent affected, and could affect, only the English estate. It was by virtue of the Scotch confirmation that the trustees obtained a title to the estate in Scotland, and that only on condition of accounting to the Scotch Courts for that property. Scotland being the country of the domicile, it is clear that the authority of the English Courts over the personal representatives of the deceased was limited to seeing the estate collected and creditors paid, and of thereafter expediting, if possible, the transmission of the surplus to the domicile of administration for the purpose of distribution. If the personal representatives had happened to be different persons in each country, this would have been all they could have done. But they were, properly and conveniently enough, the same in both, and the English Court having jurisdiction over them in respect of the English assets and by authority of the English probate, extended its authority also over the Scotch assets. According to the principles just explained, its jurisdiction ought to be a limited one even as regards the English estate; it should have no authority to administer at all, for that duty belongs to the Courts of the domicile. Still less ought it to put forth any title to administer assets already under the control of a foreign Court. In spite of all these considerations, however, the Court of Chancery assumed to itself jurisdiction to make an ordinary administration order against the executors, whom it

ordained to account to itself for the whole of the trust funds, both Scotch and English.

It is difficult for us in Scotland to understand the *rationale* of such a proceeding until we remember two things—first, that the Court of Chancery never considers international law ; and second, that it refuses to recognise the entity, or *persona* as we call it, of a trust, and operates against individuals, or as it is styled in Chancery phraseology, *in personam*. To our ideas a man's trustees represent the man himself, not singly or as individuals, but collectively and in a corporate capacity. They are liable according to our law first and primarily in their corporate or trust capacity for the funds committed to them, and secondarily and as individuals only for their personal fault when such can be alleged against them. Our Courts will not therefore remove trustees or interfere with their execution of a man's will at the simple request of any beneficiary ; he must first show a breach of duty on their part by which his rights are injured. In England, on the other hand, where there is no such thing as a trust in our sense of a corporate entity, a beneficiary simply invokes the aid of the Chancellor, and the trustees as individuals are immediately called to account. They do not require to be removed from their trust, for according to English law there is no office, properly speaking, to remove them from. And the Court of Chancery treats the beneficiary's claim as a right to which he is entitled *ex debito justitiæ*. Over Mr. Ewing's English executors, then, the Court of Chancery had, according to its theory and practice, no doubt jurisdiction to call them to account. And it has always claimed in addition, the right to serve its writs beyond its jurisdiction where such service was necessary to expiscate matters arising within it. But if the executors in Scotland had simply ignored the service upon them, the Court of Chancery could have done nothing. It might no doubt have pronounced a decree against them ; but that decree would have been simply waste paper, for it cannot be summarily enforced in Scotland under the Judgments Extension Act, and in any action raised in Scotland against them founding upon it, they would have, of course, been protected by the Scotch Courts. If they had been well advised by Scotch lawyers at first, they would no doubt have been in a better position than they are now. But even as the case now stands, can it be said that they are foreclosed from the protection of Scotch law ? We say no most unhesitatingly, and Lord Fraser's judgment abundantly confirms that opinion. He has done no more than declare the law of Scotland on the subject. He has given judicial sanction to what the Court of Chancery and the Chancellor could not be brought to see, viz. the existence in Scotland of a Scotch trust which is itself a process of administration recognised and favoured by our system of jurisprudence, and entitled therefore to the respect, or at least the consideration, of foreign Courts. Even the English judges admit

that in a case of concurrent jurisdiction (although that, as has been shown, does not, according to the principles of international law, exist here) they would respect the prior proceedings under a foreign law. And their fault was that they could not imagine any different system of administration than their own, and argued that we had no administration in Scotland because we did not in all cases apply to a court of law. Lord Blackburn indeed seemed to understand this, but he agreed with the Chancellor in affirming the judgment of the Court of Chancery, because it was consistent with the practice of that Court. Referring to that judgment he said: "Such an order does and must hamper the trustees, cause delay and expense, not necessarily great delay and expense, but always some; and where the trustees have not done, and it is not suggested that they are going to do, anything wrong, I doubt whether it is always for the benefit of all concerned to make such an order. And I am confirmed in this doubt because, so far as I can learn, you cannot in Scotland throw a trust into the Court of Session in the same way as you can throw it into Chancery in England; at least if it can be done it is not done. But though I should have had this doubt if it were new, I think it has been too long the course of Chancery to treat this as a right which the plaintiff has *ex debito justitiæ*." That is to say, English practice is not so good as Scotch, but it is English, and therefore must prevail over Scotch! The Treaty of Union ought to save us from that conclusion. It applies in terms to the present case when it says, "No causes in Scotland shall be cognoscible by the Courts of Chancery, Queen's Bench, Common Pleas, or any other Court in Westminster Hall." What is this trust but a "cause in Scotland," which has now been declared by the House of Lords (sitting, be it remembered, as an English and not a Scotch Court of Appeal) to be "cognoscible" by the Court of Chancery!

But it may be said, assuming the English judgment to be right according to English law, are not the Scotch Courts bound to respect it? We give the answer in Lord Fraser's words: "It is perfectly clear that if the practice of the Court of Chancery in England is inconsistent with international law, no Court of a foreign country is bound to respect it." It is unnecessary here to follow his Lordship's learned and elaborate examination of the authorities upon international law and practice on this point. The general result has been already indicated, and it may be summed up in the following quotation from Lord Fraser's opinion: "The executor confirmed in the domicile is the principal administrator of the estate. The executor appointed in a foreign country, who has taken out probate or letters of administration there, has a right to ingather the estate within the territory of the Court which gives him probate. He is entitled and obliged from the proceeds of his recoveries to pay all the debts of creditors in that foreign country. . . . He is bound to account to the Court

which gives him probate for all the money that he has recovered within its jurisdiction, and the executor of the domicile is not entitled to demand from him these moneys before such accounting. . . . But after having accounted to the Court where the funds were found, he is bound to remit any balance that may be in his hands to the executor of the domicile—the general administrator of the estate. All this is perfectly established practice among nations. So far as can be discovered, no such pretension as that which has been set up by the Court of Chancery in England has ever been asserted by the Courts of any other country. None of the States of America have asserted the right to bring into the Courts of the ancillary administration, and to administer there, the estate of a citizen domiciled in another State of the Union, merely because he had dollars invested in the State of the ancillary administrator. Nor is there any instance of any of the French Courts compelling an Englishman who had moneys in the French Rentes to account for the whole of his estate in the French Courts. On the contrary, as regards France, the Courts of that country do not hold themselves competent to entertain any suit for the division of the succession of a foreigner who may have died in France, and who may have personal estate there, if his domicile were in a foreign country.” Lord Fraser goes on to show that the international rule is followed by our own Courts in Scotland, and he cites numerous authorities from judges and jurists in support of its universal application. And he adds: “The result of my consideration of this case is that the orders of the Court of Chancery in England are inconsistent with the rules and practices between independent nations, and that therefore the Courts of the domicile are bound in the protection of the interests of the estate within the domicile (and to this estate alone is my judgment confined) to grant interdict against compliance with these orders.”

The interests to be protected by this important vindication of Scotch law are sufficiently obvious. The “next friend,” who appears to be the author of these Chancery proceedings, will bear no part of the expense, for he is entitled merely to a specific legacy out of the estate. The trustees cannot in fairness be made personally liable for it, and it must therefore come out of the estate itself. And any one who knows anything of Chancery procedure will readily see that the share of the residuary legatees will be considerably reduced before the estate gets out of Chancery. It is these residuary legatees who are the pursuers in the Court of Session.

One case cited by Lord Fraser may be mentioned here. It is almost the exact converse of the present, and logically followed, it would have led the House of Lords to a different conclusion from the one they have come to. In *Preston v. Melville*, 2 Rob. App. 88, there were Scotch trustees appointed to administer the estate of a domiciled Scotsman, and they obtained possession of the whole

of the personal and heritable estate in Scotland. But a different person who had obtained from the English Courts administration of the personal estate in England, refused to convey that property to the Scotch trustees, and was upheld in refusing by the judgment of the House of Lords. They held that the English administrator must account to the English Court for the English assets, and satisfy all the creditors of the estate in England. "The letters of administration," said the Chancellor, "under which he acts direct him to do so, and he takes an oath that he will well and truly administer all and every the goods of the deceased, and pay his debts so far as the goods will extend, and exhibit a full and true inventory of the goods, and render a true account of his administration. That such are the duties of an executor or administrator acting under a probate or letters of administration in this country is certain, although the testator or intestate may have been domiciled elsewhere. The domicile regulates the right of succession, but *the administration must be in the country in which possession is taken, and held under lawful authority of the property of the deceased.*" As Lord Fraser remarks, this last sentence expresses the position taken up by the pursuers in the action before him; and he adds: "The whole of the Scotch assets, the property of Mr. Orr Ewing, were taken and held under lawful authority in Scotland, and therefore they must be administered there."

As has been indicated, the executors have, to some extent at least, themselves to blame for the position in which they now find themselves. It is probably unique in the history of their office. If they carry on the suit in England, they may be imprisoned by the Court of Session for breach of interdict; and if they don't obey the orders of the Court of Chancery, they may be imprisoned in England for contempt of that tribunal. How they will extricate themselves is an interesting puzzle. It does not seem as if the law Courts could help them, for the conflict is between the systems of jurisprudence of the two countries. If Lord Fraser's judgment should come ultimately before the House of Lords, that Court will then have to determine not any rule of Chancery practice, but a question of international law—whether according to the law of nations this rule of the Court of Chancery must be respected by a foreign Court when the people of that foreign country in recognising it would be subjected to grievous expense and many inconveniences, and when, moreover, the practice itself is contrary to all sound principles of international law.

THE COST OF A SUCCESSFUL LITIGATION.

A PROMISE was made in an article published during the holiday months, which depicted the sorrows of a successful litigant, to deal

in a future article with the system under which it is possible for a litigant, after conducting a righteous cause in an unexceptionable manner to a successful issue, to find himself heavily mulcted in expenses. At the outset of such an inquiry it may be well to set forth one or two of those rules or principles which govern the award of expenses in our courts of law. The general principle is of course that of *væ victis*—the loser must pay the costs of the suit whether he be pursuer or defender, and whether he be vanquished upon a matter of fact or upon a matter of law. It makes no difference that the case is a hard one, or even that there are equities upon the loser's side. The fault for which he must pay is not for having been in the wrong, but for having, when in the wrong, insisted upon litigating his unfounded claim. The rule is a healthy and wise one, and it has the sanction of universality, for we find that throughout the world the same rule has always prevailed, not only in questions of law, but in all matters where the interests of an individual or of a community have come into collision with those of another. In a European war as in a small debt action—the losers pay.

The Bench of one of the divisions of the Court of Session has once or twice of late shown an inclination to pooh-pooh this principle: "The pursuer is a poor widow, and the defenders are a powerful railway company," and so forth. But, with deference, a railway company is entitled to just the same even and impartial justice as a "poor widow." Cases such as this indeed illustrate the expediency of the rule, for it would be intolerable were "poor widows" and "portionless maidens" to be encouraged to litigate ill-founded claims at the expense of adversaries thus doomed to feed the fire which consumes themselves.

But although the rule is in the general case a sound and just one, it is not one of universal application. Three exceptions, all of them of a somewhat general character, have come to be recognized. The successful party may be refused expenses on account of—(1) the fact that the case was "a fair one to try;" (2) his own conduct in relation to the matters submitted to litigation; (3) his conduct of the litigation itself.

The first of these exceptions is the least defined, and consequently the most difficult to explain. The unsuccessful litigant is not entitled to his expenses merely because the case was a doubtful or a difficult one, or because a point of law has been decided which was never authoritatively determined before. In certain cases, however, especially in those where the distribution of a fund has been in question, or where the courts of law have been resorted to more to clear up a doubt than to settle a dispute, the Court has refused to give effect to the general rule that expenses shall follow success, on the ground that the case was "a fair one to try." This exception is illustrated by what took place in the Irish Land Courts. There the sub-commissioners

began by awarding the tenant costs in every case where the rent was reduced; but upon appeal the commissioners directed that costs should not be awarded in such cases except in exceptional circumstances, on the ground that a process to fix a fair rent partakes rather of the nature of a reference than of a lawsuit.

The second exception, which is sometimes recognised, viz. the disallowance of expenses to the successful litigant on account of his conduct in reference to the matters submitted to litigation, is not more capable than the former of a hard and fast definition. It has never been suggested that this exception should be extended so far as to cover all cases in which law is in conflict with equity, or where the losing party has been harshly dealt with. It comes to no more than this, that when the Court is satisfied that the conduct of the successful litigant has been grossly improper or oppressive, it will, in the exercise of its discretion, refuse to award him expenses.

The third exception, which has reference to the conduct of the case itself, is one to which the Court has very frequently occasion to give effect, and it is accordingly much better understood than either of the exceptions already described. The ground of this exception is, that a litigant, whether he comes to the Court himself, or is brought to the Court by another, is bound, no matter how good his case may be, to litigate that case in such a manner as will most expeditiously, and with least expense, bring the action to a close. Success with a sound plea does not entitle the winner to expenses which have been incurred by his previous insistence on a bad plea. This exception has indeed been pushed farther than the first has ever been, or even the second, except in very rare cases; for not only is it usual for the Court to disallow expenses which have been incurred by the insistence of the successful party in unsound pleas, but in many cases such expenses are actually awarded against him.

It appears, then, that there are three generally recognised exceptions to the rule, that expenses follow success in a suit. With the rule itself, as has already been pointed out, it is impossible for any one who really understands the matter seriously to quarrel, and accordingly, if any fault is to be found with the system in accordance with which expenses are awarded, it must be found in one of the three exceptions to the rule. Now both the first two exceptions seem to commend themselves at once to every one as being alike eminently equitable and expedient. Nor do the justice and expediency even of the third, when it is considered in the abstract as a general principle, seem open to any serious question. It would be quite impossible to conduct litigation in our Courts, it would be a great injustice even to those who have brought ill-founded cases to Court, were litigants to be allowed to prolong a litigation at the expense of their unsuccessful adversaries by insisting in hopeless or frivolous pleas. When a bludgeon is in

one's hand, which will settle the matter in a moment, one is not justified in trying to kill the cat with a cane. All this seems very clear, but nevertheless great injustice is constantly being wrought in the application of this principle, and its operation, as much as anything else, serves to bring it about that the successful litigant too often finds himself in the same unfortunate position as did the redoubtable opponent of Judkins. Were litigation merely an agreeable pastime like a game of whist, there would be no great hardship in making the party who proves ultimately successful pay the cost of those incidents of the sport in which he has been the loser. The man who wins the rubber knows that nevertheless it is only fair that he should have to allow for the points which he lost in the course of the game. But a lawsuit differs from a game in two essential particulars—(1) it is not a mere amusement, but a grave reality, affecting, it may be the character, it may be the fortune, of those who are engaged in it; and (2) it is not voluntarily entered into on both sides, for a man, however loath, may be compelled by the conduct of another to have recourse to the Court as a pursuer, or he may be dragged into Court in the character of a defender.

Now it is certainly very hard that a man who is involved against his will in a litigation in which law and equity alike are on his side, and who, knowing nothing of law himself, places his case in the hands of an agent of unexceptional character, should be mulcted in heavy costs because those who acted for him thought it their duty in the earlier stages of the case to insist in pleas which have ultimately proved untenable. I am far, indeed, from suggesting that it is possible to find a complete remedy for this evil. It is impossible to dissociate the client from his legal advisers. It would never do for the Court to say: "Here is a poor country bumpkin who was quite unable to form any opinion for himself as to whether this plea was a good one or a bad one, and must therefore have been guided entirely by his agent or counsel; let us award the whole expenses against the other party." The man who employs unskilful advisers must pay the penalty of their persistence in frivolous pleas, just in the same way as a man who employs an unskilful driver must make good the damage occasioned by his servant's rashness. It might indeed be suggested that the plea of contributory negligence ought to be given effect to in the former case no less than in the latter. A man who is trespassing upon a railway line has no claim to compensation although, through the carelessness of the engine-driver concurring with his own delict, he gets knocked over and injured. So it might be insisted that the man who, by his own obstinate disregard of what was just and reasonable, has drawn another into an unnecessary litigation has no right to be reimbursed in that portion of his expenses which were incurred through the insistence of the other party in pleas which were not necessary for the determination of the unnecessary

lawsuit. There seems to be some force in this reasoning ; but I am not concerned to examine it too closely, or to inquire whether or not there be some underlying fallacy, for the most ready, and indeed an unanswerable answer to it is that were effect to be given to it, litigation would be enormously protracted, and an immense encouragement given to pettifogging. The knowledge that no expenses will be given against the other party for the litigation of untenable pleas, exercises a powerful influence in inducing an agent to avoid all frivolous or dilatory pleading, and to strive to go at once to the root of the matter. Farther than this I am not prepared to go ; but the Court does go farther, for, except in rare cases, the expenses incurred in the litigation of all the pleas of the successful party which do not ultimately prevail are generally awarded to the losing party. Occasionally, indeed, when the point raised is one of novelty or exceptional difficulty, the Court directs that the expenses incurred in discussing it shall follow success in the suit ; but the general rule in reference to such expenses is as I have stated it. The litigation of each point is regarded as if it were a separate action, and expenses are awarded accordingly. But the rule which it is thought ought to be substituted for the present practice is that the successful litigant should get the expenses which he has incurred in litigating unsuccessful pleas when the Court is satisfied that these pleas are such as no prudent agent or counsel would have been justified in recommending him to abandon. The case is in many respects analogous to the award of a war indemnity. The conduct of a man who attempts by an unrighteous litigation to destroy either the character or the fortune of another, does not much differ in moral quality from that of the nation which endeavours by an unrighteous war to rob a neighbouring State of its national honour or its territory. Now, would any international tribunal, composed of men of ordinary fairness and common sense, refuse to award to a nation which had successfully repulsed an invading force from its second line of defence, indemnity for the cost incurred and the losses sustained in unsuccessfully defending its first line. The principle of such a decision would be just the same as that applied to the expenses of litigation. No one, it is said, who has a strong plea to fall back upon should state or defend a doubtful one, and the party eventually successful must pay the cost incurred by his having attempted to maintain a plea which has been found to be untenable. Even so, it might with equal justice be argued that no nation which has a strong line of defence to fall back upon should hold or defend a weaker one, and that accordingly the nation which proves eventually successful in war must indemnify its antagonist for the losses incurred by the latter, through the former having attempted to maintain a line of defence which has eventually been found to be untenable. This illustration serves, I think, to show the absurdity and the injustice of the system which in the course of litigation

imposes a forfeit for every move which does not ultimately prove successful. The man who, wrongously brought into Court, employs agents and counsel of respectability and standing has, it is thought, sufficiently discharged his duty, and there must be something unsound in the system which renders that man liable to heavy pecuniary penalties because he, or rather those who were acting for him, did not at the outset abandon pleas the invalidity of which it may eventually have taken the Court days of anxious deliberation finally to determine. Of course this case is quite different from that where a wrong ground of action or of defence is set out from the commencement, and the front is entirely changed in the course of the litigation. The case which is figured is that where a valid ground of action or of defence having been from the outset disclosed, the action has also been supported or defended, as the case may be, by other pleas to which in the event effect has not been given.

Hitherto I have dealt exclusively with the incidence of expenses falling upon the successful party by an award of the Court, but a far more grievous burden are those expenses which are cut off the account of the successful party by the auditor of Court. That functionary recognises three distinct systems of taxation, viz.—

1. As between party and party.
2. As between agent and client when payable by a third party.
3. As between agent and client when payable by the client.

Now it is certainly not very easy for the uninitiated to understand the foundation of these distinctions. If I employ a law agent to conduct a litigation upon my behalf, and if after the conclusion of the litigation he presents an account, the charges in which are in excess of what was fairly necessary to conduct the case, then it is clear either that my lawyer has misconducted the case, or else that he has overcharged me. On the other hand, if after a successful and well-conducted litigation I am found entitled to receive from the other party less than what was fairly necessary to conduct my case, then it is clear that through the system of taxation adopted I have been defrauded of that to which I was justly entitled. Yet this is what happens every day. The same auditor will tax the same account on entirely different principles, and bring out an entirely different result, according as the expenses are to be recovered from a third party, who, be it observed, is in the eye of the law a wrong-doer, or paid by the client to his law agent.

It would be quite impossible for any one, from a study of a number of accounts taxed as between party and party, and an equal number taxed as between agent and client, to discover any principle or any system in accordance with which certain charges are allowed in the one and disallowed in the other. It would be unfair, however, to those who are charged with the duty of taxation to suggest that they do not profess and follow, or, more accurately, profess and attempt to follow a certain system. That system has been

explained as follows: "As between party and party, to allow only those charges the incurring of which is necessary to the conduct of the case; as between agent and client, to allow, except under very exceptional circumstances, all outlays and all reasonable charges for work honestly done." In other words, in the first case it is the *necessity* for the work or outlay; in the second, it is the *fact* of the same having been done or incurred to which regard is to be had. Now there is no doubt some reason in this system, especially as regards outlay. The client who entrusts his case to the agent makes choice of that agent's discretion, and if, in the honest exercise of that discretion, the agent expends more than is absolutely necessary, it seems only reasonable that the client should make the sum good. On the other hand, the unsuccessful litigant has reposed no confidence in his opponent's solicitor; indeed, so far as the former is concerned, the act of that solicitor is the act of that solicitor's client, the indiscretion of the one the indiscretion of the other; and there does not therefore seem to be any equitable reason for asking the unsuccessful litigant to bear the cost of unnecessary outlay.

As regards charges for work, upon the other hand, it may fairly be doubted whether an agent (who presumably ought to know the law, and know how to conduct a case) who has, however, honestly done work which was unnecessary or mistaken, is entitled to charge his client for the same; but that is a question apart from the subject of the present inquiry. At all events, no one would dream of suggesting that such charges should be borne by the unsuccessful litigant. So far indeed, then, as this latter is concerned, we find ourselves quite at one with the principle enunciated by the auditor, that the losing party should pay only what is necessary to the conduct of the case. It is in the application, however, of this principle that the most anomalous results are reached. That which in the opinion of the auditor is sufficient for the conduct of a case is certainly less than what solicitors find to be necessary in actual experience; indeed, it is not too much to say that no prudent, not to say sane agent, not even the auditor himself, would ever dream of attempting to conduct a litigation without exceeding the outlay recoverable in the event of success. If he did so, he would indeed deserve small thanks from his client for his pains. It would be necessary for him to disgust his counsel by sending them less than the customary fees, to employ second-rate skilled evidence, to run the risk of dispensing with the attendance of important witnesses, and to employ an agent in the country who knows nothing of the case to perform the important and often delicate duty of taking the precognitions. It is indeed impossible to specify, or to attempt in any way to classify, the different charges necessary in the opinion of every one save the auditor, which it is customary for the auditor to disallow, but a word upon two instances cited above. The matter of counsel's

fees is not one to be regulated by any table, or controlled by any cut and dry rules made by the auditor. An agent is not entitled to charge more than a certain amount for the preparation of a deed, but, if his time is more valuable than the remuneration, he can hand the deed over to one of his clerks to prepare. Counsel cannot so delegate their work, their own time is all that they have at command, and they are entitled to ask for that time the highest price it will bring. In other words, counsel's fees are regulated simply by the law of supply and demand. Now, if a senior counsel of first standing finds that it does not pay him to give his whole time for, say, less than forty guineas a day, he is entitled to that fee from any one who asks his whole time. No such fee, or anything approaching to it, however, has ever been allowed by the auditor. Take it that one has a case of great difficulty and importance, it is clear that in such a case one is entitled to the whole time of a counsel of first standing, and therefore of course one must pay the fee necessary to secure his attendance. Is there any good reason why the auditor should interfere with this fee? The auditor knows quite well that the attendance of such counsel cannot be secured for such figures as he allows. It may indeed be urged that parties should content themselves with counsel willing to work for lower fees; but the case here figured excludes any such suggestion, for it is that of a case of exceptional difficulty and importance, and surely in such a case no prudent man would fail to employ a counsel of the highest standing and widest experience.

Then again, take the case of country precognitions. The auditor here allows only the fees which would have been chargeable by the nearest country agent, instead of allowing those which the Edinburgh agent claims for doing the work himself. But surely there are few cases indeed where the duty of precognosing witnesses may with safety be entrusted to an agent who knows nothing of the case, nothing of the prior proceedings, and nothing of the practice of the Court in which the case is to be tried. Every one who has had any experience knows that there is no more delicate and difficult task, and none which requires a more intimate knowledge of practice, than the preparation of precognitions. It too often happens that counsel are, so to speak, "put upon their backs" by the totally unexpected answer of a witness whose precognition has been taken by an inexperienced and too sanguine agent. An amusing instance of this occurred the other day when one of the leaders of the bar was examining a witness. Again and again he got the exact contrary of the answer he expected, until at length turning again to the beginning of the precognition he asked with ironical despair, "Is your name Ann Smith?" The absurdity of the rule enforced by the auditor is illustrated by the fact that the auditor, whilst disallowing the charges for precognosing witnesses in the country, sometimes allows the actual outlay of the Edinburgh agent for the journey.

Of course it would be quite idle to attempt to discover any principle in this other than the fact that auditors have generally so much fellow-feeling with their kindred as to dislike having to disallow actual outlay.

It is quite a mistake to suppose that by cutting down the accounts of successful litigants the auditor does anything to diminish the actual cost of litigation. The contrary is probably the case; for, were it customary to allow to the successful party all that is reasonably necessary for the conduct of the case with prudence and efficiency, the agent would find it a matter of much greater delicacy to prefer a claim for extra-judicial expenses. As between agent and client, the judicial taxation by the auditor affords no assistance or protection. Even the most conscientious agents recognise that it is quite impossible to conduct a litigation upon the auditor's principles, and hence an account for extra-judicial expenses is the necessary and invariable sequel to a successful litigation. Were it otherwise, were accounts fairly taxed, were the agent for the successful litigant allowed to recover from the other party all that a reasonable man ought to have found necessary for the conduct of the case, then solicitors would hesitate to present accounts for extra-judicial expenses, and where such accounts were presented to any considerable amounts, clients would be in a position to complain with good reason, and they would no doubt soon find means to make such complaints effectual.

To sum up the general results of this article. The expenses of a litigation are a burden which must be borne by one of the parties to the litigation. In the eye of the law the losing party is the wrong-doer; and therefore the whole burden of his adversary's expenses should fall upon him, in so far, at all events, as these expenses have been incurred in the honest and prudent conduct of the litigation. Under our present system no such result is obtained, and therefore it would appear that some remedy is urgently called for.

PRIVATE THEATRICALS.

Two cases, one as to a private theatre, the other as to a private theatrical performance, came before the Queen's Bench Division in the end of November last.

In *Shelley v. Bethell*, November 23, the question was whether the place was a "place of public resort for the performance of stage plays," within the meaning of the Theatres Regulation Act (6 and 7 Vict. c. 68). The Act makes it unlawful for any person to "have or keep" a house or other place of this kind without authority, letters patent from the Crown, or a licence from the Lord Chamberlain or the Justices of the Peace, as the case may be.

The penalty is a sum not exceeding £20 for every day such house or place is kept open without authority. Sir Percy Shelley has erected a building constructed only as a theatre, and intended for the performance of stage plays. Occasionally he allows it to be used for such performances for the "benefit of charitable institutions." On one occasion, taken as a test case apparently, there was a performance for the benefit of the School of Dramatic Art, the performance was advertised by announcements headed "Sir Percy Shelley's Theatre," and tickets, price £1, 1s., were to be obtained from the secretary of the institution. The names of applicants for tickets were not asked, and there were no instructions to make a selection of the persons to be admitted. Some 300 tickets were sold, and some 300 persons, as many as the place would hold, were present. The Court held this was a place of public resort for the performance of stage plays. There seems to have been nothing to distinguish this place from other places unquestionably "of public resort," etc., except that the proprietor made no profit to himself, and that the place was not habitually open to the public. As for the first circumstance, the purpose to which the admission money was devoted, it is of no importance as regards the question of publicity, nor indeed does the circumstance of money being or not being taken appear determinative of the question. As regards the second of these circumstances, Lord Coleridge observed that every single day on which such a performance takes place involves a penalty; consequently it is not necessary that there should be a constant or habitual performance of stage plays. The case was thought clearly to come within the class of cases for which the Act had been intended to make provision. "The collection of large numbers of persons," said Lord Coleridge, "in buildings for the purpose of public exhibitions, leads to considerable danger of fire and otherwise, and it is therefore important that the jurisdiction of the Lord Chamberlain should be maintained, and that in a wealthy country persons of wealth and position should not be able to erect buildings which may possibly be open to grave public dangers or objections merely because he is able to dispense with the receipt of money."

The second of the cases to which we have referred, *Duck v. Bates*, November 20, 1883, related to a matter of wider interest. It raised the question whether the representation of a dramatic piece at a private house for the amusement of a private circle renders the performers liable in penalties for infringement of copyright, unless the authority of the author or assignee of the play had been obtained. At Guy's Hospital there had been on two occasions a performance of a play called *Our Boys*. The performances were by amateurs, and were for the amusement of the patients, the nurses, and their friends, the friends being admitted by tickets for which no money was paid. The plaintiff, as assignee of the copyright of the play, sued for penalties for infringement under the

provisions of two Acts, 3 and 4 Will. IV. c. 15, and the Copyright Act, 5 and 6 Vict. c. 43, the 20th and 21st sections of which extend the provisions of the first Act. It is necessary to recount the main provisions of the Acts founded on.

Apart from these Acts the representation in a public theatre and for money of a copyright play had been found not an infringement of copyright. In *Murray v. Elliston*, 5 B. & Ald. 657, Mr. Murray the publisher had sought to restrain the performance without his permission of Lord Byron's play, *Marino Faliero*, at Drury Lane, and had failed. The printing and publishing copies of the play would have been an infringement of copyright, but its representation on the stage (and the appropriate publication of a play is to act it) was not. To remedy this state of matters the Act 3 and 4 Will. IV. c. 15, commonly called Bulwer Lytton's Act, was passed. This Act gives the author (and his assignee) of a "dramatic piece or entertainment . . . the sole liberty of representing or causing to be represented at any place of dramatic entertainment" any such production (section 1). Section 2 provides the penalties of infringement: "If any person shall, during the continuance of such sole liberty . . . represent or cause to be represented, without the consent in writing of the author or other proprietor . . . at any place of dramatic entertainment" any dramatic piece or other entertainment, he shall be liable for every representation in a penalty of not less than 40s., or to the payment of "the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the proprietor, whichever shall be the greater damages to the author." The later Act, 5 and 6 Vict. c. 45, extends the provisions of this Act as to representations to musical compositions, and in its repetition of the grant of sole liberty of representation includes dramatic pieces. It provides that "the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition," shall belong to the author or his assignee. No special penalty is attached to the infringement, but section 21 provides that "the person who shall have the sole liberty of representing such dramatic piece or musical composition shall have the remedies given and provided" in the first-mentioned Act, "as fully as if the same were re-enacted in this Act." It will be observed that to amount to an infringement of the first Act the representation must be at "a place of dramatic entertainment." The second Act says nothing about a place of dramatic entertainment. But any penalties it provides is by reference to the previous Act; and the question arises whether in incorporating into the second Act the remedies of the first Act, as it does, it incorporates the remedies only, without regard to the conditions or circumstances under which the right to the remedies exists under the first Act, that is, when the representation is at a place of dramatic entertainment. The question arose in the case of *Wall v. Taylor*,

L. R. 11 Q. B. Div. 99, a case as to a musical composition called the "Will o' the Wisp," which had been represented at a concert in a public hall on one occasion and on another in a school-room, no charge being paid for admission, but a small sum being charged for refreshment. The Court of Appeal (Brett, M.R., and Bowen, L.J., *diss.* Cotton, L.J.) held that the second Act did incorporate the remedies of the first Act without regard to the conditions under which the remedies arose under the first Act, in short, that the penalties were incurred by representing a musical composition although the representation was not at a place of dramatic entertainment. "In section 21" of the second Act "it is not representing any dramatic piece at any place of dramatic entertainment, but only representing any dramatic piece or musical composition; so that the contingency is altered on which the right to the penalty can be enforced," per Brett, M.R. In this case there was no doubt that an action of damages would lie for infringing the sole right of representation given to the author; and the only question was, whether the penalties had been incurred. The reasoning of the majority of the Court seems incontestable. The opposite view is to confound the offence, or the circumstances of the offence, with the remedies. (It may be observed, in passing, that the Court of Appeal, though giving the penalties, refused to give costs either of the action or the appeal, thinking that, in the circumstances, the action ought never to have been brought either for damages or penalties, and that it was an attempt to make money out of what had really done the plaintiff no harm.) Another reason for holding that a penalty is incurred although the representation is not at a place of dramatic entertainment, was assigned by the Master of the Rolls, which does not seem so clearly sound: "If indeed a dramatic piece could be performed at any place which was not a place of dramatic entertainment, it would alter the right to the penalty given by section 2 of 3 and 4 Will. IV. c. 15; but, in truth, the words 'dramatic piece' [in the second Act] are words of supererogation; for performing a dramatic piece makes the place where it is performed a place of dramatic entertainment." The meaning of this is that even under the first Act it was an infringement of copyright to represent a dramatic piece, though not at a place usually devoted to dramatic entertainment, any place where there is a representation of a dramatic piece being for the time a place of dramatic entertainment.

In the *Guy's Hospital* case, Lord Coleridge and Mr. Justice Stephen held that the penalties had not been incurred. They held that the second Act did not apply, and that the case did not fall under the first Act, because *Guy's Hospital* was not "a place of dramatic entertainment," in respect that it was not a public place. As regards the applicability of the second Act, Lord Coleridge said the bearing of these two statutes upon each other was not perfectly clear, and further, that the Court of Appeal had not

decided how far the second Act was to be read into the first. Now, as may be seen from the statement we have given of *Wall v. Taylor*, the Court of Appeal decided most distinctly that the penalties of the first Act are incorporated into the second Act, and quite conclusive reasons were stated for so holding; so that under the second Act the penalties are incurred by a representation, although not at a place of dramatic entertainment, the second Act saying nothing about this. No doubt in *Wall v. Taylor* it was a musical composition that was in question. But the second Act applies indifferently to musical compositions and dramatic pieces. It says that the person who has the sole liberty of representing a "dramatic piece or musical composition" shall enjoy the remedies provided by the first Act. If it is to be held, as it has been held, that penalties are incurred by the representation of a musical composition, although not at a place of dramatic entertainment, the same must be held as to the representation of a dramatic piece. Indeed, what would have been the use of saying anything about "dramatic piece" in the second Act, unless there was to be some alteration in the provisions made about it in the first Act; and the alteration is, that to constitute an infringement it is not necessary that the representation should be at a place of dramatic entertainment. This being so, it was unnecessary to consider whether Guy's Hospital was a place of dramatic entertainment. The question might indeed have been raised, as it was in *Wall v. Taylor* in the Queen's Bench, though not in the Court of Appeal, whether representation in the second Act does not mean *public* representation. Mr. Justice Cave referred to a provision in the second Act, from which he inferred that "the right of representing a dramatic piece or performing a musical composition which is by these statutes conferred upon the author, is the right of representing or performing them *in public*." The Act certainly does not say *public* representation. But this point, of course, was not raised in *Duck v. Bates*, it being thought, for reasons not stated, that the second Act did not apply to the case, although, as we have seen, it follows from the decision of the Court of Appeal in *Wall's* case that it did apply. The provision referred to by Mr. Justice Cave is that the first public representation of the play is, in the construction of the Act, to be equivalent to the first publication of a book. This is for fixing the date from which the term of copyright is to run and other such purposes. Publication of course must be something public; but how does this show that anybody has a right to represent a play in private?

Turning to the first Act, to bring the case under which it is undoubtedly necessary that the performance shall be at "a place of dramatic entertainment," Lord Coleridge and Mr. Justice Stephen held that the place, the governor's room in Guy's Hospital, was not "a place of dramatic entertainment." The reason for so holding appears to be that the place was not a public place: "The performance appeared to want all the elements of publicity, for money was

not taken, and there was no general admission to the public." In order to hold that the place referred to by the Act is a public place, we must extract this from the context, for the Act says nothing about "public" place. It is said that this is to be found in the reference to "the profits" of the entertainment. But the reference to the profits of the entertainment is to be found in the provision about the liability of the offender to the amount of "the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff." "Benefit or advantage" has thus been held equivalent to payment of money. Even if this were so, payment of money is not the criterion of publicity. A place of entertainment may be public and free. Surely we have heard of *panem et circenses*. Even at this day, in some continental capitals on great *fête* days, the theatres are thrown open to the public free. A place of entertainment may also be private and admission thereto may be paid for. One may have a performance in his own house to which only a select few are admitted, but those who are admitted are charged for admittance.

The decision of the Queen's Bench Division may be sound, but the result is attained first of all by throwing aside the second Act, the applicability of which to the case is necessarily implied in the decision of the Court of Appeal in *Wall v. Taylor*; and, next, by inserting into the description in the first Act the word "public," which is not to be found in the description, but is supposed to be implied in some words in the context, which, as we have seen, do not necessarily imply it.

What the Act meant by "a place of dramatic entertainment" seems to be a thing not easy of discovery. "Public" place of entertainment is the gloss given to the words of the Act by this decision in *Duck v. Bates*. The Master of the Rolls said, in *Wall v. Taylor*, any place where there is a dramatic entertainment is a place of dramatic entertainment. On a similar mode of construction, a circus which was let out for a night for a revival meeting would be a place of religious worship. In *Russell v. Smith*, 12 B. 217, Lord Denman said the room in which a dramatic piece is performed, and to which persons paying for it are admitted for the purpose of hearing it, is for the time a place of dramatic entertainment within the meaning of the Act, although the room is ordinarily used for different purposes. If this were meant for any more than a description of the place in the case before the Court, it introduces the element of the payment of money. But surely the payment of money, although a usual incident of a place of entertainment, is not necessary to give that character to a place. Again, it has been contended that the place meant is a place dedicated to or usually devoted to dramatic entertainment. But in this view of it a company of strolling players performing one night in one barn and another night in another, of course taking money for admission, might take the benefit of an author's dramatic talent during the

whole term of copyright without paying for it, while a company acting in a regular theatre would have to pay for it. Besides all this, if we are to found on the penalty clauses at all in this relation, we must not overlook the provision of a fine of 40s., which contemplates a case neither of advantage to the performer nor of loss to the author.

In this case of *Duck v. Bates*, the Master of the Rolls was represented as having laid down the *dictum* in *Wall v. Taylor* that a lady singing a copyright song in a drawing-room would be guilty of an infringement of copyright. On inquiry of the Master of the Rolls "during the adjournment for luncheon," says the *Times*' report, it was found that the learned judge disclaimed having said this. If the trouble had been taken of looking up the report of *Wall v. Taylor*, published in the authorized law reports so far back as July last, it would have been found that the Master of the Rolls said nothing of the kind, but rather the opposite. What the Master of the Rolls did say was this: "There must, in order to give such right,"—the right given by 5 and 6 Vict. c. 45,—"be a performance or representation; and what would be a performance or representation, must be according to the ordinary acceptance of those terms. Singing for one's own gratification, without intending thereby to represent anything or to amuse any one else, would not, I think, be either a representation or performance according to the ordinary meaning of those terms, nor would the fact of some other person being in the room at the time of such singing make it so; but where, to give effect to the song, it is necessary that the singing should be made to represent something, or when it is performed for the amusement of other persons, then, I think, when this takes place it would be a representation or performance. To some extent, whether it is such or not, must in each case be a question of fact." The meaning is obvious. What the Act strikes at is the *representation* of a musical composition; what amounts to representation is a question of fact, but merely singing a song for one's own amusement would not be representation. We confess we do not understand what is meant by the representation of a song that is merely a song, and has not something dramatic in its composition which can be represented. If you were to say that you had heard, not a song, but a representation of a song, this would mean, if it meant anything, that the singer could not sing.

In the cases under these Acts an obvious attempt is made to introduce the element of publicity. It is singular, however, that if it had been intended to strike only at public representation the word "public" should have been left out. Nor is it clear that this was intended. A play has an acting or dramatic value as well as a literary value. The acting value is the primary value. Sometimes the acting value is great and the literary value is inconsiderable. The value of the *Lady of Lyons*, for example, as an acting play is very great. Its value as a literary production is twopence-

halfpenny. It was to protect the acting value that the Legislature, not content with the protection afforded to the literary value by the ordinary Copyright Acts, passed the Act of 3 and 4 Will. IV. and the clauses in the subsequent Act of 5 and 6 Vict., which give the author the sole right of representation. The author's right in a literary production would be held to be infringed if it were printed without authority even for private circulation. Why should not the author's right in a dramatic production be held to be infringed by its representation even though it be only a private representation? These Acts were intended to give to the author of a dramatic piece the benefit of his dramatic skill and aptitude, and to prevent people appropriating the product of these without his permission. People do appropriate these even though they only act privately and make no profit by acting. It is very well for a benevolent company of amateurs to afford some amusement to some five hundred people at Guy's Hospital,—patients, nurses, and their friends,—but let them do so with their own property, not taking advantage of the skill and aptitude of other people. They supply amateur acting: let them supply an amateur comedy if they like. The dramatic author cannot be blamed for saying, "Do not, in your laudable efforts, take advantage of my talent without my permission."

NOTES IN THE INNER HOUSE.

CASES in which force and fear are pleaded as grounds of reduction have been for some time past rare, and since imprisonment for debt has now in the great majority of cases been abolished, they will doubtless in the future become still rarer. The authorities referred to in *M'Intosh v. Chalmers*, October 17, 1883 (Second Division), the latest decisions dealing with the subject, are from the musty pages of Morison. *M'Intosh*, the pursuer, was illegally imprisoned for debt. As to that there was no question. But while in prison the defender obtained from him a letter of indemnity. No law agent represented the pursuer in this transaction. When he got out of prison he brought an action of damages for wrongous imprisonment, seeking also, if necessary, the reduction of the letter of indemnity. The Lord Ordinary twice threw out the case—once before, and then again after taking evidence. In the Inner House, however, there was a unanimous judgment in the pursuer's favour. The Lord Justice-Clerk laid it down: "As far as I can see from the authorities," he says, "it is sufficient in order to set aside a document so granted to show either that it was illegal in itself, or was granted while the grantee was under illegal diligence. I think that is the general rule, the only exception to which is where the surrounding circumstances make it appear that the obligation was granted for an adequate consideration." And Lord Young: "I

think there is a fundamental difference between a person under legal restraint and a person wrongfully imprisoned, and I am further of opinion that a transaction between the author of a wrongful imprisonment and his victim as a condition of ending it cannot be upheld, and that the doctrine of transaction as between independent persons cannot be applied to this case." The Court held that it was unnecessary formally to reduce the letter of indemnity. As to this a somewhat curious point of importance to law agents arose. The letter had got into the hands of the defender's law agent, who pleaded his hypothec, and refused to give it up. As, however, the pursuer admitted its terms, the Lord Ordinary held production satisfied, and also that if anything further had been necessary by way of proof, secondary evidence of the contents of this letter would have been admissible. Lords Justice-Clerk and Young were both clearly of opinion that in such a case as this a law agent's hypothec could not stand in the way. The former said: "My impression is that that is not a case in which the plea of confidentiality could have been sustained, and that it is quite clear that the plea of hypothec cannot for a moment be sustained." Lord Young remarked "that that letter could have been retained by an agent on hypothec is absurd." This decision is hardly an authority for holding that in every case where ultimately diligence is proved to have been invalid, a letter of indemnity granted in prison would be reducible. There were special circumstances, and the creditor was thought to have acted in bad faith throughout. The case of *Anderson's Trustees v. Webster*, October 23, 1883 (Second Division), is, to quote the words of Lord Young, "one of considerable legal interest and importance." It illustrates a gradual breaking down of the old Scottish doctrine of limited proof. The defender was sued for repayment of a loan; he admitted the loan, but said that he had granted an I O U; that the party lending the money had handed back this document to him, and told him to burn it, which he had done; that she had on this occasion made a gift of the money previously lent. A proof having been allowed, these facts were spoken to by various witnesses. The pursuers, the lender's trustees, maintained that the admission of the loan was sufficient for their case, and that the defender's evidence was not to be believed. The Court, however, assoilized the defender upon the question of the nature of the proof. The Lord Justice-Clerk said: "The important question is, whether the granting and destruction of this document of debt may be competently proved by parole? I am of opinion that it may, and that great injury might be done, and the door be opened to fraud, if it were to be held that it was not competent to prove by parole the facts surrounding such an alleged transaction." Lords Young and Craighill point out that parole was in such a case the only mode of proof.

M'Donald v. Glass, October 27, 1883 (Second Division), was

an action of filiation, fortunately now rare in the Supreme Court. Looking to the judgment here pronounced by the Sheriffs, one must certainly consider the appeal a very reasonable proceeding. The pursuer's child was born in November 1882. She alleged intercourse during February, March, and April of that year with the defender, her master's son. He denied all intercourse on record, but in the course of his evidence admitted connection with her in July. There were, however, opportunities of meeting at the earlier period sworn to by the pursuer. It is rather startling to find that both Sheriff-Substitute and Sheriff assolzied the defender. The Sheriff-Substitute (Barclay) remarked: "There is an obvious distinction between an admission of connection anterior and one posterior to the time of conception. Where there was the same opportunity of continued intercourse subsequent to the date of admitted connection, it is very difficult to get rid of the presumption of renewed connection corresponding to the date of conception. But where the admission of connection is posterior to the date of conception of the child born subsequently, there must be very clear proof that at the time of conception of the child there was such intimacy that could have fixed the paternity on the defender independent of the admission of connection." But referring to this view of the learned Sheriff, Lord Young says that there is not necessarily any such distinction. "Where you have connection anterior to the date of conception admitted or proved, it is so likely to have been continued, that if the woman swears to it, and the child is born at a period conform to it, it disposes me to believe her story. But that is all that can be said. But where you have connection posterior to it, it may have exactly the same effect, for it is not likely that the anterior connection was the end of it; it is as little likely that the posterior connection was the beginning of it." What doubtless weighed with the Sheriffs was the fact that the defender had admitted connection which could not have been otherwise proved. But Sheriff Barclay perhaps explains this when he says: "It is not unusual for a defender in this class of cases, probably because of some mental operation of casuistry or force of conscience, to admit sexual connection, but guardedly to place it anterior or posterior to the time of conception." We had thought it by this time clearly established law, that where in the ordinary case connection either before or after the date of conception has been proved, the woman is entitled to a verdict, if *at* that date there was opportunity for intercourse.

We note some cases relating to the authentication and validity of deeds. In *Watson v. Torrance and Others*, 24th October 1883 (Second Division), a notary, who had executed a deed for a party unable to write, set forth in his docquet that the deed had "been gone over and explained to him." Now, in the form appended to the Act of 1874 the words are "read over." But it is competent under the Act to use words to the like effect. The question came

to be whether "going over" a deed fulfilled the statutory requirement of reading it over. The Lord Ordinary held that it did not. The majority of the Inner House, however, allowed a proof, in order to ascertain what this "going over" amounted to. Lord Rutherford Clark dissented, his view being that "even assuming the notary had read every word of the deed over to the party who executed it, the technical question would still, I think, remain, whether the words used in the docquet were to be held as in accordance with the word 'read,' which I look on as a statutory solemnity."

In the special case *Skinner and Others*, 13th November 1883 (First Division), the Court had to consider the question whether or not effect is to be given to an unsigned holograph writing. This question, which has been frequently raised, was here brought under circumstances very favourable for a decision of the abstract point, for the document was complete in every respect with the exception of the signature. It contained the name of the writer *in gremio*, and was found in a likely place along with other writings of importance. We would refer our readers to a short statement of the law upon this subject in vol. xxv. of the *Journal*, p. 401. Reference is there made to the case of *Dunlop* (1 D. 920), in which the Court took the same view as that expressed the other day in *Skinner's*. In *Dunlop's* case, however, there were facts pointing to the document having been only a draft. The Court have now given full effect to the opinion of Lord Stair, who says that if holograph writs "be not subscribed they are understood to be incomplete acts, from which the party hath resiled." The only judge at all disposed to dispute the *dictum* was Lord Deas, who, however, felt himself bound by the authority of *Dunlop*. The law may now be considered to be finally settled beyond all dispute, and the case of *Gillespie v. Donaldson*, 10 Shaw 174, must henceforward be rejected as an authority.

In *Menzies and Others v. Fraser and Others*, November 21, 1883 (First Division), the Court have repelled the objections taken to an onerous deed—a bond, that the granters had not signed in presence of one of the testamentary witnesses, nor acknowledged their signatures to him. It was laid down that the granter of such a deed cannot afterwards challenge it on a latent and technical ground.

An important question under the Bankruptcy Act was raised in the case of *Lee v. Ferrier*, October 23, 1883 (First Division). It was this: Whether a bankrupt and his cautioner have a right to withdraw an offer of composition accepted by the creditors, but not yet approved of by the judge. The Court have answered this question in the negative. The Lord President said: "An offer of composition, when once accepted by the creditors, is a contract from which there can be no resiling without good cause. No doubt the contract requires the Court's approval before it can be acted upon. But that approval follows as a matter of course if no

obstacle presents itself either in form or substance." He proceeds to point out that if a bankrupt could resile from his offer, any one of the creditors would have an equal right to back out of his acceptance. But while parties cannot resile in this manner, they may properly bring under the notice of the judge any change of circumstances which would warrant his refusing to interpose judicial authority to the offer of composition. This we gather from the Lord President's remarks. He says: "Suppose that great delay, not attributable to the bankrupt or his cautioner, took place in getting the offer of composition approved of when the estate has been put into the trustee's hands, and had, owing to the trustee's delay, greatly deteriorated. In such a case as that the Court would not refuse the remedy, because the cautioner entered into the contract on the footing that he was to get the estate of the bankrupt at its value as at the time when he made his offer." The principal authority for the cautioner was a judgment in the Bill Chamber by Lord Gillies in the case of *Ironsides v. Gray*, 4 D. 629. But, as the Lord President points out, "there is no report of Lord Gillies' opinion, and therefore we do not know what his precise view was." He added: "I should be slow to accept a rule so pernicious as this would be on the authority of any single judge, however eminent."

THE ACTION FOR BREACH.

THOSE advocates of the preservation of the action for breach of promise of marriage—and we dare say there are many such who think that the mere antiquity of an institution is sufficient to give it a title to veneration—will be pleased to hear that it is older than the Roman law itself. The *lex non scripta* of Latium, we are told, provided that, if an agreement to marry was broken for no just cause, the party in fault should be condemned in such damages as would represent to him or her the loss of the marriage in question. But those who, like Hudibras, are convinced that there is no reason why—

——— we should all opinions hold
Authentic that we can make old,

will deem the origin and basis of the action in this country of more importance. In England it is of comparatively modern growth. As far back as the reign of Queen Elizabeth, indeed, a suit somewhat of this description was brought by a speculative male plaintiff of the period, who alleged that a certain lady had given him flattering words equal to a promise of marriage; that he had therefore delivered to her money and other things; and that she had afterwards married another man in deceit and fraud

of the plaintiff. But this was obviously more like "an action on the case in the nature of a deceit" than a breach of promise of marriage suit properly so called. Still, in the reign of Charles I., we find reported an action founded on an express allegation of a promise to marry by the defendant, and ever since then it has been established law that such an action will lie.

It was not, however, till quite recent times that the Courts have been so inundated with these actions. The principal reason for this no doubt is that up to the year 1753, under the law of what was known to the canonists as "precontract of marriage," a male or female plaintiff could come into Court and compel a defendant to marry her—a state of things which perhaps gave rise to the popular phrases "courting" and "courtship." "If," it is laid down by the erudite Swinburne, "parties had contracted to marry one another, either *per verba de præsenti* or *per verba de futuro cum copula*, a subsequent marriage with any other person would be annulled; the defendant would be required publicly to solemnize his marriage with the plaintiff, and be enjoined penance (additional penance we presume is meant); and on refusal would be excommunicated and imprisoned by writ out of Chancery, until he complied with the order of the Court." In the *Maid of Honour*, Massinger makes his heroine sue to the King for the specific performance of a written promise to marry her, and a similar incident occurs in Shakespeare's *All's well that ends well*. It will be readily admitted that a simple action for "breach" is child's play compared to such a drastic remedy as this; and it was not until Lord Hardwicke, in the year we have mentioned, succeeded in getting an Act passed abolishing the custom of precontract that the suits so beloved of newspaper reporters commenced to increase and multiply. Indeed, whilst Lord Hardwicke's Act was being considered, those who opposed it in Parliament, together with litigants and the general public, were reminded that after it came into effect a party would still have his or her remedy at law for damages.

Directly the action became common it may be said also to have become the subject of severe criticism. There can be little doubt that it is susceptible of the grossest abuse. As long as there are men and women who would pay almost any money to avoid the risk of incurring public odium or ridicule, so long will there be designing persons ready to take advantage of their weakness whenever opportunity offers. One well-known, and, we are sorry to say, to a certain extent typical, case occurred about seven or eight years ago. The action was brought against a clergyman of sixty-five by a woman of thirty-five. The plaintiff's case was very weak, especially in the point of corroboration, and the promise was absolutely denied by the defendant. Unfortunately, the reverend gentleman happened to be afflicted with an impediment in his speech, and an invincible habit of yawning. He was also a

great valetudinarian, and, according to a calculation made in court, had taken about 67,000 pills in the course of only a few years. All this made him cut an absurd figure in the witness-box, and the jury, perhaps thinking that a man who admitted having swallowed so much medicine need not make wry faces over taking the plaintiff, found in her favour with £150 damages. A new trial was applied for, and satisfactory evidence subsequently adduced that that buccaneering female was a woman of loose life, and had been convicted for theft, and that during the time of her alleged engagement to the defendant she had threatened two other persons with proceedings, and had succeeded in inducing one of them to settle for £80.

Students of society and other papers will be able to recall innumerable cases which have been themes for semi-prurient curiosity and ill-conditioned levity, until a murder, a collision, or a heavy failure has driven them from public memory. Why, then, do more than allude to the well-known actions between the young barmaid and the old bank director; between the ballet-girl and Lord Newmarket; between the æsthetic spinster and the bluff naval captain who was cast in £500 damages, although he had never done more than look at the plaintiff in his life. Are not their histories written in the book of the daily chronicles?

If we were to summarize all the actions ever brought, we should find as a nett result that the class of women really intended to be protected from scoundrelism by the law seldom or never seek redress in a Court; that those who do are pretty well able to protect themselves, and that their feelings are not so sensitive as to be made the subject of sentimental damages, unrestrained by dry calculations of actual loss. If we add to this, that wily spinsters or crafty mothers have already weapons enough in the social armoury to frighten a timid man into marriage, although he may never have gone farther than to praise the colour of the lady's dress, we think we have established a sufficiently good case against the action *as it at present stands*.

But we are far from saying that any loss (other than the loss of the defendant himself) resulting from a breach of promise of marriage should not be made actionable, as any other breach of contract. In 1879, Sir Farrer Herschell carried a motion in the House of Commons—"That in the opinion of this House the action for breach of promise of marriage should be abolished, except in cases where actual pecuniary loss has been incurred by reason of the promise, the damages being limited to such pecuniary loss," and a Bill, drafted upon this principle, was presented last year, and slaughtered with many other "innocents." It is likely, however, to be reintroduced in the coming session, and if it be made to cover the case of the loss of an *actual bona fide* suitor, one measure of the damage being the amount of his income, we think it will do all that is necessary, and a constant recurring scandal will be

stopped. The whole difficulty arises from the illogical attempt to reduce sentiment to a money or marketable value. In this connection we are reminded of the summing up of the learned justicer who, according to the books, addressed his twelve assessors as follows: "The learned counsel says you ought to find for the defendant. Well, you may if you like, but don't you go and do it because he asks you. He asked me not to leave the case to you at all; but I mean to. Very well; now, what are the facts? The defendant admits that he promised to marry the girl; of course, if he is a man at all, he can't deny that; and his counsel says he is a fool—very likely, but what then? Lots of people are fools, but they marry. Then that's no excuse for him. Next the defendant says that the plaintiff would not have him; she says she would; which of them do you believe? He has three hundred a year—and—and well, she's a woman; there! She don't dislike money, you know. This is an action to get, what? Why, money, to be sure; and defendant's money too, mark that. She can't bring an action for the man, and I can't order specific performances of the contract to marry, because the law says damages—that's money—are as good as a husband. First, then, there's the loss of the husband's income. Then the loss of the man; and when you've settled the damages on these, there's compensation for the injury to the plaintiff's heart—her feelings, you know. Now, here the learned counsel says there are no particulars. He must say something, of course; that's what he's for. I don't know what he expects. He can hardly want a list of *regrets* at so much a dozen; *misery* at five shillings an hour, let's say; or an account of the number of tears, or pints of 'em, that the plaintiff has shed over this business, the whole to be paid for at so much for the lot, with a reduction perhaps, on account of the defendant's taking a larger quantity. I wonder he does not say there are no bought and sold notes to prove the contract. I should know how to deal with that. Well, you and I may not like this sort of action. Very likely we should prefer to horsewhip a man of that sort down there. But we must be forensic, and so you are to find your verdict for the plaintiff. Now then, what damages? Don't give too much, for if you do the Court will set your finding aside, or the defendant may be broken up, and the plaintiff get nothing after all. What do you say?"—*Pump Court*.

Reviews.

Juridical Styles. Vol. II. "Moveable Rights." Fifth Edition.
Edinburgh: Bell & Bradfute. 1883.

THE Juridical Society of Edinburgh may justly be regarded as the leading legal society in Scotland whose object is to cultivate a
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practical scientific study of law among its members. But it has done and is doing more than this. It has given from time to time to the profession generally the fruits of the experience and study of its members young and old, not only in the scientific and historical aspects of the study of law, but also in its practical application. So far as we are aware, it is the only legal society in Scotland publishing material contributions to a subject which affects every one closely. In this respect law compares unfavourably with other subjects. The natural sciences, for example, are represented by societies innumerable who publish essays, treatises, and transactions which bear honourable testimony to the activity and enthusiasm of their members. But law has been hitherto regarded as outside the boundary line of an educated man's general knowledge. It has been relegated to a coterie. Looked upon as something so surrounded by technicalities as only to be understood by men who have devoted their lives to its study and application; a branch of learning of which a little knowledge is dangerous, and ignorance is bliss; and it has suffered accordingly. But there are now signs of awakening interest on the part of the public, and to this are due the great alterations in the law of Scotland which have been enacted within the last thirty years. Until the lever of public opinion is vigorously applied no thorough reform will be effected, and that lever will never be properly applied till laymen realize that a subject with which their interests are so much bound up is worthy of study, and is not so incomprehensible as they imagine. The public are the losers, lawyers are not the gainers by the perpetuation of obsolete forms and principles which are inapplicable to the conditions of modern life; and we trust that the time is approaching when legal societies throughout the country will follow the example of the Juridical Society of Edinburgh, in arranging for the delivery and publication of such lectures as those of the late Cosmo Innes, besides undertaking such useful practical publications as that under review.

The various editions of the Juridical Society's Styles which have been published from time to time during this century have commanded the confidence of the profession. Of the new issue the volume on Heritable Rights has already been reviewed in these pages. This volume forms the fifth edition of the part of the work on Moveable Rights. Since the last edition in 1865 there have been passed several Acts affecting the subject, and these, with the exception after noticed, have been explained and given effect to in the present edition. The names of the committee of the society more immediately concerned with the production of the present volume are a guarantee of the care which has been expended on it; to which care it bears unequivocal testimony. The task of these gentlemen was probably less arduous than of those who were entrusted with the volume on Heritable Rights, and of those who are entrusted with the much-needed forthcoming volume on

Signet Letters ; but they are nevertheless entitled to credit for the care which has manifestly been bestowed. It is difficult to review a book which can only be thoroughly tested by experience. The chief value of the present volume lies in the forms, the terms of which are not expressly laid down by statute. When the terms are laid down by statute there are few practitioners, we hope, who would trust entirely to any book of styles. In our examination of the present volume we have only detected one set of forms with regard to which an unfortunate slip has apparently been made. We refer to the forms of Protests of Bills. The recent Act on Bills of Exchange, section 51, subsection 7, lays down most distinctly what a Protest *must* specify, viz. "(a) The person at whose request the bill is protested. (b) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found."

But of the eight forms given, Nos. 1, 2, 3, 4, and 6 appear to us not to comply with the imperative provisions above quoted, and no notice of these essential particulars is taken in the remarks which head the section where they might most appropriately have appeared. The forms given would have been quite suitable before the passing of the Act referred to. But now the Act requires, over and above what it was formerly customary to put into protests in Scotland, a specification of the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found. Before the passing of the Act, these particulars were implied or included in the term "duly protested ;" but the new statute would appear to require them to be specifically stated, and such is now the practice. In the form given on page 22, these particulars are stated, but this is said to be at the requisition of the debtor. The forms Nos. 5 and 7 also comply with the statute. These three forms, however, were occasionally used before the passing of the Act. All the other forms, which are the leading ones, ignore these statutory requisites. This section of the book, indeed, appears to have been copied almost verbatim from the last edition. It is undoubtedly a blemish on the book, and may lead over-confiding lawyers into serious trouble. It is, we think, worth the publishers' while to consider whether a few corrected pages might not be issued to subscribers before these volumes are bound.

While pointing out this oversight, we acknowledge the general excellence of the work, congratulate the Society on its appearance, and confidently recommend it to the profession.

The Practice of the Sheriff Courts of Scotland in Civil Causes. By JOHN DOVE WILSON, Advocate. Third Edition. Edinburgh : Bell & Bradfute. 1883.

EVERY one connected with the Sheriff Courts of Scotland, whether

as judge or practitioners, is much indebted to Mr. Wilson for this new edition of his well-known and most excellent work. There was great occasion for it. Shortly after the second edition made its appearance in 1875, very important changes in Sheriff Court practice were introduced by the Act of 1876. Mr. Wilson at once came to the assistance of the profession with his *Law of Process* under that Act, published in the same year. But reform did not stop here. In 1877 another statute, enlarging the powers of the Sheriff, was passed. After that there was exhibited an extraordinary activity in the direction of amending and modifying the law relating to the recovery of debt and treatment of debtors, the results of which have been embodied in no less than three statutes. Let us suppose the case of a Sheriff Court solicitor who has been absent from Scotland since the date of Mr. Wilson's last edition, and kept in ignorance of all that has taken place during the past few years, returning to his work. He would find some things to surprise him. If he drew a summons as of old, it would be rejected as an incompetent form; if he proposed a prorogation of consent, once the most natural thing in the world, and of weekly occurrence, it would be refused; he might be called upon to defend an action relating to heritage,—when he obtained a decree he would find his threats of imprisonment smiled at; he would behold creditors seeking a *cessio bonorum*, and no longer opposing it. In short, he might fairly ask himself whether he was truly awake, and actually in Scotland.

But no practitioner, whether rusty or coming for the first time to engage in the work of his profession, need have much difficulty if he only consults such a work as that now before us. He will find a clear statement, an excellent arrangement, full references to authorities, and a very valuable collection of all the statutes and acts of sederunt necessary for consultation. It is quite needless to enter more fully into the merits of a work so well known and highly appreciated as that of Mr. Wilson. Towards the end of his Introduction we observe that the author indulges in some hints as to future legislation. Certainly much remains to be done. There still exist some glaring anomalies. We mention two. In the first place, although by Act of Parliament certain counties have been formed into united sheriffdoms, the machinery for carrying this union into effect is quite defective. Because, forsooth, Sheriff-Clerks have no united jurisdiction, the unfortunate suitor who lives, it may be, a stone's-throw from the county town of A is obliged to carry his action to that of B, many miles away. And yet the counties of A and B are declared to be one sheriffdom. Of what use is the declaration? Again, when we come to the forms of Sheriff Court procedure, it is simply ludicrous to find that while a man may bring almost any kind of action in the Small Debt Court, he is limited in the Debts Recovery by the terms of an ancient statute, which has no relation to Court

practice. The Debts Recovery Court should embrace every kind of action, and litigants, or rather their agents, should no longer have the option of avoiding it as at present. As long as an option exists, we shall never get rid of preliminary pleas, revised pleadings, and other expensive and time-consuming follies.

The Agricultural Holdings (Scotland) Act, 1883, with an Introduction, Summary of Procedure, and Notes, and an Appendix containing Forms for use under the Act, etc. By CHRISTOPHER N. JOHNSTON, M.A., Advocate. William Blackwood & Sons, Edinburgh and London. 1883.

THE Agricultural Holdings Act, like many—we might perhaps say like most—Acts of Parliament, contains a series of conundrums, the answers to which are difficult to find even with the help of such useful notes as are supplied in this work. If it were not for some bright exceptions, we would be tempted to conclude that the English language was unfit to express the good intentions with which the Legislature annually fills the Statute Book. It ought to be possible to pass an Act of Parliament the meaning of which shall be plain and unambiguous, and the language of which shall neither suggest doubts nor raise difficulties in the way of giving effect to the general object of the Act. Mr. Johnston indeed suggests excuses for the “omissa” and “commissa” in this Act, which he is careful to point out. “To the fact,” he says, “that the Scottish Act was modelled, in the main, upon the lines of an Act framed with reference not only to a widely different state of the law, but to a distinct agricultural system, may be ascribed some of the obscurities and obvious mistakes and omissions in which the former Act abounds.” But this excuse does not go for much. It will not console unfortunate landlords and tenants trying to spell out their rights and duties from the provisions of the Scottish Act, to be told that its blemishes are to be accounted for by the existence of obscurities in the sister Act for England. These obscurities occur where one would least expect to find them. The section dealing with the application of the Act ought at least to have been carefully worded, instead of having its meaning conveyed by a double negative. Where a tenant has sublet his holding, several difficult situations, which are not provided for, may occur. Thus under section 4, the subtenant is entitled to begin drainage improvements on two months’ notice to the tenant; but if he begins immediately on the expiry of the two months, he may cut the tenant out of a claim for compensation against the landlord, to whom the tenant has not been able on account of want of time to give due notice, while he himself claims compensation from the tenant. The Act does not explain what is meant by specific compensation in section 5, and the second and third provisions of the same section

provide an ingenious puzzle. Where there is a "*particular agreement in writing*—whatever that may mean—to secure a tenant fair and reasonable compensation, compensation is to be payable in pursuance of the *particular agreement*; but where, in a lease current at the commencement of the Act, *specific* compensation is not provided by *any agreement in writing*, compensation is to be payable in pursuance of the *particular agreement*, if the compensation be fair and reasonable." This apparently contemplates that a lease may not contain any *agreement in writing* for payment of *specific* compensation, and may yet contain a *particular agreement* which secures fair and reasonable compensation to the tenant. Then in section 6 it is provided that certain reductions are to be made from the compensation payable to the tenant, and also that certain other deductions are to be made. What is really meant, and what ought to have been expressed, is that certain sums due to the landlord are in the referee's award to be set off against the sum found due to the tenant, and decree only given for the balance. Section 17, however, says nothing about deductions, but provides that the reductions and augmentations are to be stated in the award. Again, does the last clause of section 6 mean that the tenant is both to get damages from his landlord for failure to execute stipulated improvements, and also compensation for the same improvements which he has executed himself. In section 7 it is said that a landlord may make a claim for compensation under the Act where the tenant gives notice of his claim; but under the Act no such compensation is provided. Apparently the Act means that the landlord may put in a claim for deductions under section 6; but such a claim is very different from one of compensation.

The sections dealing with procedure are full of difficulties, and thoroughly deserve Mr. Johnston's criticism, that "the procedure provided is novel and clumsy, full of strict technical requirements, which remind one of the old forms of pleading, and failure to comply with any one of which is quite irremediable." There are stringent provisions that the referee and oversman must pronounce their awards within very short periods, while it may be impossible for an oversman to do so, especially when the award is to specify the amount of expenses to be paid; and this amount is apparently to be taxed by the Sheriff Court auditor, subject to review by the Sheriff, before being inserted in the award. If the oversman fails to pronounce his award within forty-nine days, or the single referee within twenty-eight days, he is *functus*, and there is no provision as to what steps are then to be taken. Are the proceedings to begin afresh, as is provided where a single referee fails to act within seven days of his appointment, or is the case supposed to be provided for in subsections 2 and 8 of section 9, and the single referee or oversman to be held "incapable of acting," when the referees are to appoint *another* oversman, or the parties are to

begin afresh? It is easy to see how much expense may be incurred by this unnecessary strictness. In section 28 why is there no provision to suspend its application to leases which expire at Whitsunday 1884? The Act passed on 25th August, and accordingly as a year's notice was not formerly required, all leases expiring at next Whitsunday are renewed by force of the Act for another year. This oversight may be productive of much individual hardship, which it was unnecessary to inflict in introducing the great improvement of requiring a year's notice on either side that the lease is not to be renewed. The provisions as to the bequest of leases, too, raise several questions. If the legatee does not intimate the bequest within twenty-one days, does the Act mean that his right is to fall? Is a landlord bound to intimate his objections to the legatee either personally or by the *known* agent to whom the legatee gave intimation, or may the landlord intimate through another agent? Why is the Sheriff only given the alternative of declaring the lease null, or decerning in terms of the prayer of the petition? The petition may be irrelevant, or the prayer may claim too much. Why is the Sheriff's decision on such an important question to be excluded from review?

Of recent years the exclusion of the jurisdiction of the Court of Session has been carried to a dangerous extreme, but it is scarcely possible to conceive a case in which its exclusion has less justification. The legacy of a lease may be of very great value, and yet, under this Act, the judgment of a Sheriff-Substitute may deprive a legatee of a property worth thousands of pounds.

The preceding observations on the provisions of an Act the objects of which are generally recognised as beneficial, are sufficient to show that the Act needs careful annotation. This has been done by Mr. Johnston. In a well-written introduction the Act is analysed, the various alterations on the common law stated with precision, and the difficulties which are raised by the terms of the several sections pointed out and discussed. The observations made by Mr. Johnston are deserving of attention by all who may have occasion to refer to the Act, and will be found of much use in elucidating its provisions. The Summary of Procedure which follows the introduction is of especial value, and if the hints given are attended to, will prevent much loss of time and money. The notes appended to the sections of the Act are well-considered and suggestive. In an appendix a short note for the guidance of landlord and tenant on the requirements of the Act gives some very pertinent advice, and the forms for use under the Act, though of course only tentative, will be of material assistance in the framing of agreements and notices.

The Month.

Dinner to Mr. Charles Robertson, Advocate, late Treasurer of the Faculty of Advocates.—A large number of the members of the Scottish Bar entertained their late treasurer, Mr. Charles Robertson, at dinner on the evening of Friday the 21st December, on the occasion of his retirement from office. Mr. Robertson has watched over the funds of the Faculty for about five-and-twenty years, with the result of materially increasing them. It was but natural, therefore, that the Bar should testify its sense of his services by some mark of its obligation to and esteem for him. The large and brilliant gathering which assembled on the 21st ult. proved how universally popular Mr. Robertson was with his brethren at the Bar. About eighty gentlemen sat down to dinner in the large hall of the Waterloo Hotel. As might be expected at this season of the year, a number of apologies were received both from judges and advocates. The chair was occupied by the Dean of Faculty, who had on his right hand Mr. Robertson and Lord Watson of Thankerton, and on his left the Lord Justice-Clerk. The Lord Justice-General was prevented through indisposition from attending. Under the presidency of the Dean a most delightful evening was spent. The toast list was commendably short, comprising, besides the usual loyal and patriotic toasts, only those of the guest of the evening, the Bench, and Mrs. Robertson. The Chairman proposed Mr. Robertson's health in singularly felicitous and appropriate terms, and it was replied to with much feeling and earnestness by the ex-treasurer. The Lord Advocate proposed the Bench, which was acknowledged by the Lord Justice-Clerk, who in turn proposed the health of Mrs. Robertson. A few more speeches, not on the list, were made; Lord Fraser gave the toast of the Junior Bar in a very humorous and characteristic speech, which was replied to by Mr. Lyell. The Treasurer of Faculty (Mr. J. Balfour Paul) proposed the health of the Vice-Dean, and the Solicitor-General that of the Chairman. The designs on the menu cards were most tastefully drawn by Messrs. D. J. Mackenzie and J. Boyd, advocates, and showed that there was no small amount of artistic talent amongst the members of the Junior Bar. It was universally agreed that no pleasanter gathering of the Faculty had ever taken place, and it is to be hoped that more social meetings of the kind may be held in future than has hitherto been the case. The dinner was of a most *recherché* character, and was purveyed in admirable style by Mr. Grieve.

Appointment.—After a most unjustifiable delay on the part of Government, we are glad to learn that the Sheriff-Substituteship of Selkirk, vacant by the death of Mr. Milne, is to be filled up by

the appointment of Mr. Charles Spittal, who is at present Sheriff-Substitute at Wick. The vacancy at Wick will, it is not unlikely, be filled by the translation of a Sheriff-Substitute from still more hyperborean regions.

Perth Sheriff Court—The Retirement of Sheriff Barclay—Introduction of Sheriff Grahame.—Sheriff Macdonald having given notice that he was to make reference to Sheriff Barclay's retirement from the Bench at the Court held on the 17th ult., a large number of the members of the Perthshire Bar assembled in the Perth Sheriff Court. The Sheriff, who was accompanied to the bench by Sheriff Grahame, first called on Mr. Thomas, Sheriff-Clerk, to read a communication he had received from the Secretary of State, setting forth certain new judicial arrangements connected with the county.

Mr. Thomas then read the following order:—

I, the Right Honourable Sir William Vernon Harcourt, one of Her Majesty's Principal Secretaries of State, in pursuance of the powers vested in me by an Act passed by the Parliament held in the 33rd and 34th years of the reign of Her Majesty, cap. 86, do hereby order as follows:—

1. There shall be one salaried Sheriff-Substitute for the whole county of Perth, who shall reside generally at or near Perth.

2. The boundaries of the eastern and western districts of the county shall remain as at present, and all causes, civil and criminal, arising in the said districts, shall be tried within the boundaries of the same respectively, according to the now existing law and practice.

3. The Sheriff-Substitute shall proceed to Dunblane on a stated day once in each week during session, and once in every three weeks during vacation, for the purpose of holding an Ordinary Court, and for the despatch of all other business, civil and criminal, competent in the Sheriff Court.

(Signed) W. V. HARCOURT.

WHITEHALL, 11th Dec. 1883.

Sheriff Macdonald said—Gentlemen, as the whole responsibility in connection with the establishment in the counties now rests with the Crown, and as the Sheriff of the county has no duty or responsibility in regard to it except, if asked, to give such advice as he may think wise, I thought it would be unbecoming in me, on the retirement of our respected friend Sheriff Barclay, to say anything from this Bench to you which might reach the public until the authorities in this matter had taken the action they thought proper. I am sure you will all feel that it was out of no forgetfulness of the long and valued services of our dear friend Dr. Barclay that that recognition upon his retirement has been delayed so long. There is certainly no man who has ever sat on the Bench as Sheriff who has received more respect, both for his earnest atten-

tion to duty, his conscientious care in the administration of justice, and his unvarying courtesy and kindness to all with whom he associated, than our dear and valued friend who has now officially left us, although, I trust, it is officially only. Dr. Barclay entered on duty in Perthshire as a Sheriff-Substitute more than half a century ago, and during the whole time he has served in Dunblane and here there has been but one opinion, I am sure, amongst all who were associated with him as to the way in which he carried on the work of these Courts,—that of a universal feeling of respect, and which long ago merged into one of affection and regard. Dr. Barclay also, whilst a painstaking and hard-working man at the duties which he had undertaken, found that time which all active minds find to engage in a great deal of other and useful work, for the benefit of his fellow-citizens and the benefit of every one with whom he came in contact. In addition to that, he will be remembered, long after his retirement from the Sheriff-Substituteship of Perthshire, for the valued contribution made by him to the works which we all find useful in the labour of our profession. Not only so, but he will be remembered also for many genial and bright contributions to the passing literature of the day, in which he has shown that geniality of character, and that interest in historical and archæological research which distinguishes him amongst all his compeers. I know he has often alluded from this Bench to the large number of Sheriffs he has seen; and I can only say, that if what he has always said about the Sheriff of Perthshire never dying is really true, then I do hope he may see a great many more; and at all events, whether the Sheriffs who have sat here and have left the Bench before Sheriff Barclay did, or left that Bench afterwards, I am quite sure there is no one of them but who, so long as he is alive, will value him as a friend, and, when his day comes, will remember him as one endeared to them personally in a much closer manner than in the case of persons often connected together officially. I am sure he has left behind him, on his retiring into private life, troops of friends, and that he goes into his retirement with the good wishes of us all. (Applause.) One thing I am quite sure of, that as long as he lives his retirement will not be one of idleness, but his retirement will be, as his public life has always been, one in which his mind is active for the benefit of his fellow-creatures. In the lines of the poet—

Absence of occupation is not rest.

There was no better exemplification of this than in Dr. Barclay, and I am sure that moment which is called leisure was not to him one of idleness, but rather of active enlightenment and usefulness for the benefit of his fellow-men. (Applause.) Let us hope that those who succeed him will imitate his example, and thus endeavour to make the official position a centre from which the blessing of a kindly and genial character may go out to all. Now, gentlemen,

as regards the business of the county, the intimation which has been read to you says nothing of an appointment, but that is because, in the course which the Crown has thought proper to take, no appointment is necessary. Our friend Sheriff Grahame, whom you all know, is already a Sheriff in this county; and as there is now to be only one Sheriff-Substitute, there is no need for a new appointment. And certainly there is no need that I should introduce Sheriff Grahame to you. You all know him well. Formerly he was here acting when occasion required, but for some months, in consequence of the delay that has taken place in settling the new arrangements for the county, he has been with you practically daily. I can only assure him on my part that I welcome him here to this bench permanently, as I am sure you all do, with the perfect confidence that his duty will be well and carefully performed, that he will be as useful in his place and the object of as much regard as our friend Dr. Barclay has been in the past. (Applause.)

Sheriff Grahame said—It would not, I think, be becoming in me were I to make any lengthened address, either with reference to my old friend and late colleague, or to the position I am now called upon to occupy. When I heard from Sheriff Macdonald this morning in the train of the arrangement that had been made, and that it was now expected that I would take the place so long and worthily filled by Dr. Barclay, while I had a feeling that was natural of great satisfaction, if not pride, in being called to such an honourable position, I at the same time was in a great measure oppressed with the feeling of the responsibility which the duties now to be undertaken involve, and that it would be a difficult matter for me to discharge them adequately, or as they have been discharged in the past. I have, however, felt that I have every reason for encouragement in the noble example left me in the official career of Dr. Barclay, and that I would have the assistance of the Bar to carry me through the many difficulties that may lie before me; and knowing as I do the anxiety of all the members of the Bar not only to discharge properly the duties they owe to their clients, but also to do what in them lies to promote the general aims of justice, I have good confidence, and I trust that in some measure I may be enabled to fulfil the duties which will now devolve upon me. I think that on this occasion, and as being the only representative of the western district here, it would be becoming in me to refer to the deep feeling of affection in the breasts of the members of the Bar of the western district, who have been long acquainted with Dr. Barclay, and who appreciate his qualities both personally and as a judge. If it had been known in the West that reference would be made to-day to Sheriff Barclay's retirement, the members of the Bar there would have been present to have joined in expressing their feelings of affection and respect for the old Sheriff. Personally my own relations with Dr. Barclay have been of the most kind and pleasant nature. When I came to

Perthshire, now a long time ago, I found him ever ready to help, and the value of his counsel and of his sympathy with me I have found to be of the very highest character. Now that he has left this Bench and has become a citizen, I rejoice to think that my relation and association with him are not interrupted. I do not think I need say any more on this occasion. I look forward to the future with happiness and with confidence, and I trust that I shall be enabled in some measure to walk in the steps of my dear and respected late colleague, Dr. Barclay. (Applause.)

Mr. A. Graham, Crieff, President of the Society of Procurators of Perthshire, said—My Lord, on behalf of the Bar, I desire to say that we cordially concur with the very feeling and tender address you have been pleased to deliver to us to-day. I am quite sure that you could not address those remarks to a more appreciative audience, or one better qualified to form a just opinion of Dr. Barclay's qualifications. His retirement was a serious and grievous matter to us at first. We had no doubt that a successor could easily be got, but the relations we had held with Dr. Barclay for many years were of such a tender and interesting nature that it was impossible for us to separate from him without feeling the deepest regret. We believe that these feelings are as strong on his side as on ours. All our members of Faculty have come into official life under his auspices. We know how tenderly and lovingly he regarded us all. His connection with us was more that of an indulgent father than that of a judge. Our intercourse with him has been more of the nature of private friendship. We had many opportunities of meeting Dr. Barclay, and he was ever ready to encourage the young with advice and counsel when required. We are quite aware it was impossible in the circumstances of this case sooner than to-day for your Lordship to have referred to Dr. Barclay's retirement. We have already sent our regards to Dr. Barclay as a body, and these have been duly acknowledged. In regard to Sheriff Grahame, I, on behalf of the Perth Bar, congratulate him on his appointment. The settlement is one which will give great satisfaction to us. He may count on receiving the assistance and aid of the members of the Bar in the conduct of business. He is no stranger to us, but has been favourably known to the Bar for many years. We can appreciate his high gentlemanly toned feeling, his ability and perfect capacity to carry out all the duties which lie before him. No doubt these will be heavier than in the cathedral city of Dunblane, but we have every reason to believe that he will prove himself a satisfactory and excellent judge in this Court. Altogether, Sheriff Grahame, I can assure you your appointment here has been matter of anxiety. There has been a great deal of controversy as to the division of the county, and, as you know, for the last two months there has been considerable doubt that the jurisdiction of the county might be somewhat

We sent a deputation to the Lord Advocate. Some

people were inclined to think that our grievance was a sentimental matter altogether. We had not that opinion. We thought it was a very serious matter, and thought it was necessary to keep the county together, and have it under our jurisdiction. The Lord Advocate received us most favourably, kindly, and indulgently, and I avail myself of this opportunity to thank that gentleman for his kindness in that respect. We feel that he appreciated the difficulty we had, and I am glad to think that our representations have had some good effect. We were much indebted to your Lordship for your aid in this matter, and I desire to thank your Lordship. Sheriff Grahame can confidently count on having our assistance in the conduct of his duties. We know that they will be heavy and hard, but we believe him to have the capacity and desire to fulfil them with satisfaction.

The ordinary business was then proceeded with.

Experiments "Coram Judice."—The practice of experimenting before judges is likely to receive a check, if it is often followed by such results as happened in a case before Mr. Justice Pearson last week. Two German firms were disputing the exclusive right in certain patents for improvements "in the production of colouring matters suitable for dyeing and printing." The contention of the defendants was that the chemical means described in the specification were impossible, because, if the "oxyazo-naphthalinoine" were to be united with the "fuming sulphuric acid" of the strength therein described, it would be dangerous to human life; and an experiment *coram judice* was proposed. In an unguarded moment the judge consented, and adjourned to an empty room, where the baleful mixture was concocted, by adding a teaspoonful of the unpronounceable liquid to an ounce of fuming sulphuric acid. The result was terrific. "So dense and poisonous" were the effects of the fumes which arose, that judge, counsel, witnesses, and bystanders fled, "with the utmost precipitancy, to avoid being asphyxiated on the spot." Her Majesty's judges are brave men; but, even in the search for truth, they ought not to be exposed to dangers hitherto reserved for combatants in China; and the smoking out of the Royal Courts of Justice, as if it were a nest of hornets, is a contempt of Court for which none of the penalties provided by the Lord Chancellor's Bill is adequate.—*Law Journal*.

Correspondence.

THE WIDOWS AND OFFSPRING OF LAW AGENTS.

SIR,—I shall be glad to be corrected if I am in error. My present impression is that the widows and offspring of law agents connected with the Sheriff Court are not so well provided for—if

provided for at all otherwise than by insurance—as other branches of the same profession, or as other professions, are provided for. If that be so, it is surely high time to remove such a reproach! There is no valid excuse for it. Law agents are the most numerous branch of the profession; but, if the truth must be told, I expect their widows and offspring are often very necessitous. Even £1, 1s. per annum as a compulsory payment—or say £2, 2s. per annum from such as would voluntarily associate themselves, under Act of Parliament, for this purpose—would provide, in a few years, a large capital, the interest of which would be a great boon in many instances. I enclose my card.—I am, etc.,

A SOLICITOR.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF CAITHNESS.

Sheriff THOMS and Sheriff-Substitute SPITTAL.

SINCLAIR v. BAIKIE.

Proof—Where counter claims are set off, onus on defender.

This was a petitory action where the bulk of the items of an account sued for were admitted and consigned. The defender stated (very irrelevantly) on record counter claims in order to extinguish the balance unconsigned. The proof, however, enabled these to be disposed of on appeal without further delay and expense. The interlocutors pronounced were as follows:—

“*Wick, 23rd October 1883.*—Having considered the process, and heard parties’ procurators: Finds (1) That in or about May 1882 the defender Baikie, having contracted for the building of certain cottages at West Watten, entered into a sub-contract with Adam Munro, freestone hewer, for the supply of freestone for said cottages; (2) That it was thereafter arranged that Munro should abandon the sub-contract, which was then to be taken up by his father-in-law, Alexander Sinclair; (3) That on 30th May 1882 the pursuer wrote the defender (20 of process) as follows: ‘I have now got dimensions for freestone needed for West Watten cottages, of which you spoke to me a few days ago. Please say in course how you are to pay the contract, if I go in to carry on the freestone part, in finding materials; say in letter that you are to pay me the amount of contract, stating the sum;’ (4) That on or about 3rd June 1882 the pursuer and defender entered into the agreement embodied in 54 of process, whereby the pursuer undertook to deliver at Watten Station the freestone required ‘as per contract for West Watten cottages,’ for the sum of £125; (5) That thereafter the pursuer furnished certain quantities of freestone to the defender, who used the same in the building of said cottages; (6) Finds it proved that the pursuer failed to furnish a sufficient quantity of freestone in terms of the contract, and that the defender had, in consequence, to supply the deficiency by providing material and

labour: Finds that the defender, in settling with the pursuer, is entitled to deduct the expense of supplying said deficiency, and that the sum of £9, 8s. is in the circumstances a reasonable deduction: Finds that the defender has all along admitted his liability to pay to the pursuer the balance of the contract price sued for under said deduction, viz. £113, 16s. 9d., and has consigned the same in bank on behalf of the pursuer, to wait the order of Court; assoilzies the defender from the conclusion of the summons, and decerns; grants authority to the pursuer to uplift the consigned money: Finds the defender entitled to expenses; allows an account thereof to be lodged, and when lodged, remits the same to the auditor of Court to tax and report, and decerns.

“(Signed) CHARLES GREY SPITAL.

“*Note.*—The pursuer makes no attempt to prove that he has fulfilled his part of the contract. He seems to have left the carrying out of the contract entirely to his son-in-law, Adam Munro. He appears to construe his contract as meaning that he was to deliver a certain number of stones at Watten, though he nowhere tells us what that number was; and that if his stones were too small the defender ought to have rejected them, and applied for bigger ones; and at the debate he contended that the defender's claim for abatement amounted to what is known as of the nature of an *actio quanti minoris* inadmissible in Scotch law. I do not think that the cases quoted for the pursuer apply in the present case. The case of *McCormack*, 3rd June 1869, 7 Macph. 854, was a question of quality of the goods. The present case is not one of quality. The quality of the stone was never objected to. This is a question of quantity, and I think comes under the rule of *Robertson v. Harper*, 6 W. & S., where it was held that though a purchaser is bound to object on receipt of goods in respect of any defect of quality, he need not object till called on for payment in respect of any deficiency of quantity or short weight. I think that the course taken by the defender was the best for all parties. In the course of the building he found that a number of the stones furnished by Munro were too small, but he was pressed for time, and he used the stones so far as they would go, and made up the deficiencies as he went along. If he had rejected all the undersized stones, as the pursuer says he should have done, it would have been a very expensive matter for the pursuer, and I think therefore that this action comes with a very bad grace from the pursuer, who, but for the course pursued by the defender, might have had to take back a large number of the blocks of freestone, and furnish others of more correct size.

“(Intd.) C. G. S.”

Against this interlocutor the pursuer appealed, and the Sheriff disposed of it thus:—

“The Sheriff having considered the pursuer's appeal, with reclaiming petition and answers, and whole process, sustains said appeal, and recalls the interlocutor submitted to review: Finds (1) That the defender has all along admitted (defences, answer 1, and art. 4 of defender's statement) liability to the pursuer for the account sued for, No. 6 of process, with the exception of the item of £125, under date 27th February 1882, charged as ‘amount for hewer work for cottages at West Watten;’ (2) That the defender lodged in bank on or about 26th June 1883 the sum of £113, 16s. 9d. as in full of the pursuer's demand for a balance

due him of £123, 4s. 9d., with interest at five per cent. per annum from 14th June 1883, the date of citation in this action; (3) That £9, 8s. is thus the amount of principal in dispute between the parties, and is made up of counter claims by the defender—

“ 1. For quarrying and labourage of about eighteen yards of blue stone, put in to make up for freestone not of the specified size,	£1	5	0
2. For lime, sand, and labourage (no further specification on record),	0	18	0
3. For buildings (left thus unspecified on record),	2	5	0
	<hr/>		
	£1	8	0
4. For labour, cutting and fitting some of the freestone through ‘want of proper measurement’ (left thus unspecified on record),	1	10	0
and			
5. For material and workmanship in filling up eighteen vents on thickness of freestone cope,	3	10	0
	<hr/>		
	£9	8	0
	<hr/>		

(4) That the defender has failed to prove what were the specified sizes of the pieces of freestone to be supplied, and also that there were pieces of freestone supplied not of specified sizes, and in consequence that the defender is not entitled to have effect given to his first counter claim; (5) That the defender has failed to prove any grounds on which he can maintain his second, third, and fifth counter claims, and that the defender is not entitled to have effect given to them: Therefore finds the pursuer entitled to decree against the defender for £123, 4s. 9d., with interest at five per cent. thereon from the date of citation, under deduction of £113, 16s. 9d., and any amount of interest the bank may allow thereon; grants authority to the pursuer to uplift said last-mentioned sum and interest; appoints him thereafter to lodge a state, embracing interest, showing the sum due him, and for which he asks decree; reserves all question of expenses, including the expenses of stamping the document, No. 54 of process, and decerns *ad interim*.

“*Note.*—The Sheriff would call the Sheriff-Substitute’s attention to the necessity of seeing that on adjustment the record as regards both parties’ averments is specific and exhaustive, so as to make it on both sides relevant. Had the defender refused to do so the Sheriff-Substitute should have found the counter claims as stated to be irrelevant. The averments in defence here are nearly unintelligible, and the proof does not clear matters up. From the position the defender assumed he should have been made to lead in the proof, but this is of the less importance, as the defender was the first witness called.

“The Sheriff, to save expense, has dealt with the case as it stands. His findings as regards the first counter claim explain how he cannot sustain it. The proof does not throw much light upon the vague second and third counter claims. The pursuer’s obligation as regards the lime, sand, labourage, and buildings to which these refer is not set out, and is not to be found in the proof. The ‘want of proper measurement,’ whatever

that may mean, which is the ground of the fourth counter claim, seems, if it existed, to lie at the door of the defender as much as the pursuer. And as regards the fifth counter claim, the defender's letter, No. 50 of process, suggests the sizes which were sent. Henderson, the defender's foreman, alludes to this suggested alteration, and adds: 'The chimney-tops were made like that sketch—the tops were to be solid, but were made with pieces—the way the vents were made was cheaper to the hewer.' This is the strongest evidence the defender brings against the pursuer, but it in no way proves any obligation on the pursuer to pay for carrying out the defender's own suggestion. Had it been necessary to consider the matter, the Sheriff would have held the defender's conduct to be a bar to this and the other counter claims which he has attempted to set up."

Ad. George M. Sutherland—*Alt.* Robert Leith.

SHERIFF COURT OF FORFARSHIRE.

Sheriffs TRAYNER and ROBERTSON.

CAMPBELL v. GRANGER.

Master and servant—Wages—Improper food.—In the month of September, Duncan Campbell, dairyman, lately residing at Letham, near Arbroath, and now in Glasgow, sued William Granger, farmer, Letham, in the Forfar Small Debt Court, under the following account:—

August 8, 1883.—To wages earned by and due to me as your dairyman at Letham for the period beginning with 12th March and ending this date, when I terminated my service owing to your failure to supply me with wholesome or proper food, and your declinature to alter its character or quality, and to your insisting on my hawking milk through Arbroath on Sundays—

21 weeks, at 10s. per week,	£10 10 0
Deduct payment to account,	5 8 0
	<hr/> £5 2 0

To sum placed in your hands for my intromissions as dairyman, and which you improperly retained though said service has come to an end, and you have been requested to pay the same,

£5 0 0

In all, £10 2 0

Having heard the evidence, the Sheriff-Substitute, in respect of the importance of the points involved, remitted the case to the ordinary roll for further procedure. A proof was taken, when a number of witnesses were examined at great length, and Sheriff-Substitute Robertson decided as follows in favour of the pursuer:—

Forfar, 15th November 1883.—The Sheriff-Substitute, having made *avizandum* with the proof: Finds, in fact, that the pursuer did not get wholesome food to eat while in the defender's service: finds that although he repeatedly complained, the defender failed to supply him with good food: finds, in law, that he was justified in leaving the defender's service: finds him entitled to wages up to the time he left. Therefore decerns against the defender for the sum of £5, 2s., being balance of wages, together with the sum of £5, being the sum deposited by him as security

for his good behaviour. Finds the defender liable in expenses. Remits to the auditor to tax and report, and decerns.

"*Note.*—Mr. Fraser, in his book on *Master and Servant*, vol. i. p. 127, points out that a servant is entitled to get good wholesome food; and if a master, after repeated complaints, denies him this, then the servant may leave. It requires a strong case, however, to justify a servant leaving his situation. I have never seen a case where it has been attempted. The evidence in the present case is most perplexing. On the one hand, the servants in a body describe the food they got as bad and disgusting; on the other hand, the three Miss Grangers describe it as perfectly good and wholesome. I have come to be of opinion that the combined evidence of the servants, who are in a manner independent of each other, is more weighty than the evidence of the three Miss Grangers, who are all closely interested in telling the same story. The servants have all either left the place, owing to the bad food, or are leaving this Martinmas term. The pursuer left in August; the witness Russell left in October, and was paid his wages; the witness Edwards, although he remains in the service, refused to eat the house food, and takes his meals in the bothy; two women-servants leave this Martinmas term. They all swear they were obliged to eat rotten cheese, maggoty soup, stinking butter, mouldy bread, and sour milk. They say that this disgusting diet was the rule, not the exception. It is proved that they all begged meal and milk from the men in the bothy, and that a private store of the necessaries of life was kept by them,—purchased by them out of their wages. And this may explain what puzzled me as the proof went on, namely, that all these ill-fed persons looked the picture of health. It is not probable that the pursuer, who had deposited the sum of £5 when he entered Miss Granger's service as a guarantee for his behaviour, would run the risk of losing his money, besides his wages, by leaving her service on frivolous grounds. Nor is it likely that the six servants at the farm would conspire to tell a series of falsehoods against the Miss Grangers had they met with ordinary good treatment. I am therefore driven to the conclusion that the Miss Grangers are persons who carry economy too far, and have in their anxiety to save money denied their domestic servants the wholesome diet which is their legal right. It is remarkable that the only old servant brought forward by these ladies to give evidence on their behalf said that even years ago their maid-servant had to beg food elsewhere, and was half-starved."

The defender appealed to the Sheriff Principal, who adhered.

Act. Oswald—*Adv.* D. & W. Smith & Bennet.

SHERIFF COURT OF FORFARSHIRE (DUNDEE).

Sheriff-Substitute CHEYNE.

STEWART v. SHEEDY.

Affiliation and aliment of illegitimate child—Husband and wife—Wife suing without husband's concurrence—Title to sue—Pater est quem nuptiæ demonstrant—Conjugal Rights Acts.—In this case a married woman raised an action in the Sheriff Court against a man not her husband, alleging that she had been deserted by her husband, and that four years after her desertion she had given birth to a child of which the defender was the

father, and concluding for payment of aliment. The defender denied the paternity, and pled (1) *Lis alibi pendens*, (2) No title to sue, (3) *Pater est quem nuptia demonstrant*, and (4) The debt sued for being one due to the pursuer's husband *jure mariti*, and he not being a party to the action, the same fell to be dismissed.

Question.—Can a married woman sue for the aliment of an illegitimate child? (*Williamson v. Bain*, 8 R. 1880).

The subjoined interlocutors explain the procedure in this case:—

“*Dundee*, 24th October 1883.—The Sheriff-Substitute appoints James Smith Mills, accountant, Dundee, *curator ad litem* to the pursuer, who being present in Court took the oath *de fidei administratione officii*. Further appoints the pursuer to enrol the case for the Court of Wednesday next to adjust and close the record.

“(Signed) JOHN CHEYNE.”

“*Dundee*, 31st October 1883.—The Sheriff-Substitute closes the record on the petition No. 1 and defences No. 6 of process, and having heard parties' procurators, makes *avizandum*.

“(Signed) JOHN CHEYNE.”

“*Dundee*, 2nd November 1883.—The Sheriff-Substitute, having considered the closed record, repels the defender's first plea-in-law in respect it is not supported by any averment, and before answer allows to both parties a proof of their respective averments, and to the pursuer a conjunct probation, and assigns as a diet of proof, Friday, the ninth day of November current, at eleven o'clock forenoon, within the Sheriff Court House here.

“(Signed) JOHN CHEYNE.”

“*Note*.—I certainly feel the force of the observations of the Lord Justice-Clerk and Lord Young in the case of *Williamson v. Bain*, 1880, 8 R. 72; but at the same time, if it be the fact that the pursuer's husband has not had any communication with her for nine years, and that she has been unable to discover his present whereabouts, I think it would be an injustice to her, or rather to the child (for it must be remembered that the claim is of a peculiar nature, and that the true creditor is the child), if she were not allowed to sue with the assistance of a *curator ad litem*, at all events for the current term's aliment. The result of so holding would be that the defender would escape the liability of contributing to maintain his bastard child (for in considering relevancy I am bound to assume that the pursuer can prove her case), in consequence of the accident of his paramour being a married woman. There may possibly be some ground for drawing a distinction between current aliment and the arrears. As to that, however, I reserve my opinion, and indeed I wish it to be understood that I hold myself entirely open upon the question of title to sue, and that the proof allowed is strictly before answer.

(Intd.) J. C.”

“*Dundee*, 12th November 1883.—The Sheriff-Substitute circumscribes the term for proving against both parties, and having heard their procurators makes *avizandum*.

“(Signed) JOHN CHEYNE.”

“*Dundee*, 22nd November 1883.—The Sheriff-Substitute, under reference to the subjoined note, supersedes consideration of the process for four weeks with a view to the pursuer taking steps to obtain an order for protection under the Conjugal Rights Acts.

“(Signed) JOHN CHEYNE.”

"*Note.*—At the recent discussion the defender's agent called my attention to the case of *Skinner v. Anderson's Trustees*, 11th March 1870, 7 Scot. Law Reporter 397, which had till then, owing to its not being reported elsewhere, escaped my notice, and on consideration I am of opinion that the course there followed by the Court is the proper course to be taken in circumstances such as we have here, and furnishes the solution of the difficulty which the judges felt and expressed in the case of *Williamson v. Bain*, referred to in my previous note. I may explain with reference to the delay in the issue of this interlocutor, that the pursuer's agent waited on me a day or two after the case was taken to avizandum, and stated that a communication he had received from Milngavie, in answer to a note of inquiry he had sent there, made him hopeful that he had discovered the pursuer's husband, and would obtain his concurrence to the action, and also his evidence as to his history during the last 8½ years. I therefore delayed pronouncing any deliverance, but I cannot do so any longer, the pursuer's agent having informed me yesterday that he had learned that the man supposed to be the pursuer's husband had lifted his wages and left Milngavie. I may add that the circumstances which I have just mentioned seem to me to furnish an additional reason for not proceeding farther till the pursuer has got a protection order. I forbear at this stage to enter upon the merits of the case beyond stating what indeed might be assumed from the course I have taken, that as at present advising and assuming the objections to title to sue got over, I am against the defender.

"(Intd.) J. C."

Act. Watt & Caesar, solicitors—*Alt.* David Duncan & Son, solicitors.

SHERIFF COURT OF LANARKSHIRE (GLASGOW).

SHERIFF LEES.

CAIRD v. SIME.

Copyright—University lectures.—5 and 6 Will. IV. cap. 45.—*Held* that though there can be no copyright in lectures delivered by a professor in a university to his students, he has a right of property in his delivered lectures, whether written or not, which may be protected by interdict against a publisher from reproducing them *verbatim*, or in substance, for sale.—This was an action in which Professor Edward Caird, Professor of Moral Philosophy in the Glasgow University, craved interdict against William Sime, bookseller, Sauchiehall Street, Glasgow, from publishing and advertising two volumes, entitled *An Aid to the Study of Moral Philosophy*, in respect that these books were the reproduction, actually or substantially, of his class lectures. The defender denied that such was the character of his volumes, and pleaded that, even were it proved that such was the case, the pursuer was not entitled to the protection he asked. He accordingly opposed any order for proof being granted. Sheriff Lees issued the following interlocutor:—

"Having heard parties' procurators and considered the cause, repels the pleas for the defender so far as preliminary, reserving their effect on the merits: allows to parties before answer a proof of their averments; and appoints the case to be put to the roll of the 5th December, that a diet may be fixed.

"*Note.*—The pursuer is Professor of Moral Philosophy in the University of Glasgow, and he asks the Court to restrain the defender from publishing and advertising two volumes, entitled *An Aid to the Study of Moral Philosophy*. These books, the pursuer alleges, are actually, or at least substantially, a reproduction of his lectures. The defender denies that, as matter of fact, such is their character; and he pleads that, as matter of law, even although what the pursuer alleges be true, he would not be entitled to the protection he asks. It is therefore necessary to dispose, in the first place, of the defender's preliminary plea, since, if it be sound, there is no use in allowing the pursuer to try and prove what, if proved, would be of no service, for *frustra probatur quod probatum non relevat*. To dispose of the plea I must in the meantime assume that the pursuer's averments are true, and that the defender's publications are just the printed form of the pursuer's lectures.

"At the debate I was favoured by the parties' agents with a very painstaking and able argument, and was furnished with a reference to numerous authorities in support of their pleas. I have carefully considered these cases and various other English and American authorities too numerous to specify in detail. But the point may be brought within small compass. Copyright has nothing to do with the matter. Copyright is the right of an author in a published work, and cannot arise till publication. But before publication an author has indisputably certain rights. He has a right of property in his material, and a consequent right to protection against, and to damages from, any one who appropriates it. This is perfectly settled law both in England and Scotland, and has been more or less freely recognised for more than a century. And however much the ten eminent English judges consulted by the House of Lords in the great case of *Jefferys v. Boosey*, 4 H. L. C. 815, differed on other points, there was a consensus of opinion on this—that at common law an author has a right of property in his unpublished work.

"If, therefore, the pursuer here has some right of property which falls within this rule, and which he has not debarred himself from vindicating, and which the defender has invaded, then he is entitled to the protection he asks against the defender. In this way there arise two questions of law and one of fact. The former of these alone fall to be disposed of at this stage. Firstly, is there a right of property in lectures; and, secondly, does delivery of them to a class in a university constitute such a publication of them that the lecturer loses the right to prevent reproduction of them? As regards the first point, I take it as not susceptible of question that an undelivered lecture which has been reduced to writing has the same right of protection that is possessed by every unpublished manuscript. Letters, it is *triti juris*, have this protection; and lectures may be said to occupy an intermediate place between them and the manuscript of a book. The mere selection of the lecture form as the form in which the results of thought or research are to be expressed, has no bearing on the matter. Many books of great value have been framed and issued in that form. Neither has the purpose for which that form has been selected any bearing; for a material which has been cast with a view to being delivered in lectures may, by a change of purpose, be issued in book form. So far as the matured thought has not been reduced to writing, or

formulated by utterance, there can be no protection, for there can be no infringement. The anticipated author may wish with Donatus, *perant illi qui ante nos nostra dixerunt*, but he can do nothing more. The rule of their respective rights is just *fit occupantis*, and writing or utterance is the badge and test of possession. But the defender contends that in oral expression there can be no right of property. As regards mere casual utterances, this is unquestionably true. In a pun, a conversation, an anecdote, and such-like *epæ plectant*, there is no right of property. Nor is there in a speech, for in its conception it aims at publicity, and once for all; repetition is no part of the utterer's object; and the idea of private property in such a matter is obviously inconsistent with its intention and its utterance. But can it be said to be the same with the oral lectures of a professor to his class? His aim is not publicity of his words; his students of that year are all he seeks directly to reach; and unless he has taught them wrongly, or his subject be without limit, or be characterized by incessant progress, then his thoughts as expressed that year must be the same as those similarly expressed last year—better expressed it may be, more luminously, more concisely, or more forcibly stated; but still the same thoughts. Just as the man is the same, though he is differently clad each season.

"It seems to me, therefore, erroneous to say that in uttered but unwritten lectures there can be no right of property; and I think there is authority to the contrary. The Act 5 and 6 Will. IV. cap. 65, in making certain remedial provisions for lecturers, nowhere restricts the protection to written lectures; and though etymologically the word 'lecture' may imply that there must be something written or printed so as to be read, it has long ceased to be applied exclusively to written lectures, whether delivered from the platform or within the curtains. In *Abernethy v. Hutchison*, 1 Hall & Twell 28, it was admitted that parts of the lectures were unwritten, and yet protection was granted against reproduction of them. And in a case cited by Mr. Curtis (p. 103), the well-known American writer on copyright, it would appear that the French Courts took the like view. The sole material difference is one of proof, which may be more difficult where the words have not been put in writing. Or could it be said that if a lecturer had his lectures in writing and read one but recited another, that he had protection for the one but not for the other? The whole question, I think, is this—Has the defender appropriated ideas that he knew the pursuer had already taken possession of? The criterion of the right of challenge is dishonesty. If there is no taking, there is no case for protection. Identity of thought or expression may afford a presumption more or less strong, according to circumstances, of dishonesty. But unless it be shown that there is some fraud, there is no remedy; for that would be to give the unpublished work the same protection as the published.

"The next question is—Does the delivery of his lectures by the pursuer to his class divest him of the protection he has against fraudulent appropriation of undelivered lectures? In 1835 a statute was passed which bore to be for the purpose of 'preventing the publication of lectures without consent.' It provided that the authors of lectures, or those who had acquired the right from them to deliver them anywhere or for any purpose, should have the sole right of printing and publishing such lectures.

Certain penalties were then provided against those who took down such lectures in shorthand, or in any other way, and published them. The prohibition was extended to newspapers, and it was specially provided that no person allowed to be present at any lecture for a fee or reward should be held thereby to have acquired leave to print, copy, and publish such lecture. If, therefore, these statutory provisions had been made applicable to lectures delivered in a university, the present case could not have arisen. But by the fifth section of the statute these were excluded from its scope—(1) Such lectures as were delivered without notice in writing two days beforehand to two Justices of the Peace living within five miles of the place where the lecture was to be delivered; and (2) 'any lecture or lectures delivered in any university, or public school or college, or on any public foundation, or by any individual in virtue of, or according to, any gift, endowment, or foundation,' and it was declared 'that the law relating thereto shall remain the same as if this Act had not been passed.'

"Thus the pursuer's lectures have not the protection of the statute; and because they have not its protection the defender has assumed and maintained that they have no protection at all. This appears to me to be an entire misconstruction of the statute. A remedial statute is not to be construed as making worse the position of those matters to which the remedy is not given; and the words of the Act which I have quoted show that its object was not to take away any right of protection which such lectures as the pursuer's may have, but to give increased protection to certain kinds of lectures, and to impose in favour of the latter certain penalties which are not attached to the former. The Act says that the law relating to such lectures as the pursuer's is to remain the same as if the statute had not been enacted. Accordingly the question arises—What was the law in regard to such lectures? I have already explained at some length that in unpublished written lectures, and, as I think, in unpublished oral lectures also, there is a common law of property pertaining to the author. And I am further of opinion that the mere delivery of the lecture to the students does not divest the pursuer of his right of property. It is impossible to decide such a question without keeping in view the circumstances under which the lectures are delivered. They are not like a speech delivered for publicity's sake. They may rather be said to be delivered for the sake of those who, for their own mental training and information, but not for purposes of dissemination, have obtained the privilege of listening to them. In the case of a speech the want is with the speaker: he wants an audience. In the case of a college lecture the want is with the students: they want a teacher. In other words, the orator volunteers publication of his thoughts; but in the case of a professor the students purchase the personal use and advantage of his thoughts and tuition. To some extent the position is like that of a manufacturer who pays a royalty to the deviser of some mechanical contrivance, and which payment gives the manufacturer a right to enjoy and to make use of the fruits of the inventor's skill for his own manufactory, but not to communicate the use of it to others for his own profit.

"Now the evil which the defender seeks to perpetrate is twofold; for it may affect both the purse and the reputation. The teacher is entitled to retain for future sale such right of property in his work as he has not

parted with, and he has the right, for his reputation's sake, to see that what is issued as his is issued in a form which will not injure his reputation. As Professor Bell says (Com. i. 111)—'The ideas of a man's mind are so identified with himself, that whether they can be regarded as a pecuniary value in the way of property or not, he ought to be the sole arbiter of their fate, to authorize or to prevent their publication. No man has a right to publish another's thoughts to the world, or to propagate their publication beyond the point to which he has given consent.' Now, it is quite possible that the views of a professor would not be given to the world in the same form in which he chose to divulge them to his class. American law would seem to act even more liberally, and to extend the protection to a public lecture. (See *Palmer v. Dewitt*, 23 L. T. (N. S.) 823.) It is not necessary for the purposes of the present case to discuss this point, or whether protection would be granted to an author who sought the widest area for his fame, like the father of history reading his works at Olympia to listening Greece. In such cases it is probable that no contract against reproduction would be implied; but in the case of a set of lectures delivered to a restricted audience, and still more in the case of a professor lecturing to his class, there is surely an implied contract that the communication of the views is personal to the members of the class.

"In support of this proposition, I may refer to some authorities. In the early part of this century, Dr. Abernethy, the distinguished physician, was in the habit of lecturing to a class of students at St. Bartholomew's Hospital. One of these lectures was reproduced in the *Lancet*, and an intimation was given that others of his lectures would follow. Application was made to Lord Chancellor Eldon to restrain this literary piracy, and it was decided (1 Hall & Twell 28) that the publication was a fraudulent infringement of the lecturer's rights. Now, that was in 1825, or ten years before the statute to which I have referred above was enacted. When, therefore, it provided that the law in regard to lectures not falling within its scope should remain the same, I apprehend it meant the law laid down in Dr. Abernethy's case was to remain the law of the land. In the case of *Keene v. Kimball*, 16 Gray 551, it was thought in the Supreme Court of Massachusetts that a student, whatever use he might make of the information he had acquired, could not reproduce it in print or by oral delivery. I may, in conclusion, refer to the very instructive case of *Prince Albert v. Strange*, 18 L. J. (N. S.) Ch. 120, in which, after elaborate discussion, it was decided that a person who had surreptitiously acquired possession of some impressions taken from etchings which Her Majesty and the Prince had been in the habit of making for their own amusement, could not reproduce them or even publish a catalogue of them. I refer parties to this case, not as directly ruling the present one, but because of the exhaustive discussion of principle it contains, and the instructive opinions delivered in the decision of it. I am therefore of opinion, if it be assumed (as for the disposal of the defender's preliminary plea it must be) that the pursuer's averments are true, and that the defender's volumes are an unauthorized reproduction of the lectures delivered by pursuer to his class, that he is entitled to the protection he asks from the Court."

Act. Lamond—Alt. M'Nee.

THE JOURNAL OF JURISPRUDENCE.

LAW AND MORALITY.

"He had two selves within him apparently, and they must learn to accommodate each other and bear reciprocal impediments. Strange, that some of us, with quick alternate vision, see beyond our infatuations, and even while we rave on the heights, behold the wide plain where our persistent self pauses and awaits us."—MIDDLEMARCH.

I. We are taught by our daily experience that a man is more than his wants. He is, let us say, cold and hungry; he has a definite want, and desires a definite satisfaction. Suppose him warmed and fed. He is satisfied; but his satisfaction is of short duration, for the mere act of living furnishes him unceasingly with fresh wants. And even when we leave the realm of appetite and desire, and enter a realm of loftier and more comprehensive aims, a permanent satisfaction is still to seek. Here, indeed, the individual is no longer seeking the pleasure of the moment. He has here some larger end in view. Taking his experience of past satisfactions, he employs it as a standard of comparison by which to gauge the amount of pleasure derivable from the gratification of this, rather than of that, desire. In other words, he reflects, and, in the light of his past experience, renounces this in order to obtain that. As to what this ideal is, in view of which men choose and refuse, all are agreed. "The pleasure of the saint and of the sensualist, of the student and of the athlete, are alike in the one indescribable quality which makes the *bien être* for each enjoying self."¹ We all desire happiness; but to the question, In what does happiness consist? no one of us returns an answer precisely the same. Happiness presents to each a different aspect; for as tastes, opinions, and pleasures differ, so do the ideals of happiness, founded upon those pleasures, opinions, and tastes.²

It is plain, then, from the very nature of happiness, that in its

¹ Simcox, *Natural Law*, p. 91.

² I. H. Fichte, *System d. Ethik*, ii. 126.

realization no permanent satisfaction would be found. It is, as we have seen, merely a sum of known pleasures, which, in reflection, are contrasted as a whole with the particular desire or satisfaction under examination, and which, consequently, assume the appearance of a unity. It could be realized only by securing the particular pleasures of which it is the sum; and, accordingly, it partakes in their quality, and fails, as they fail, in affording permanent satisfaction.

Each man is thus more than his wants, for he remains unsatisfied in their satisfaction; and for the same reason, he is more than his happiness. His individual life is not sufficient for him.

But, in point of fact, the individual *qua* individual has no actual existence. Man "may be in the position of a Robinson Crusoe, and living in a desert island; but even so he must have been begotten, born, kept alive through infancy, and have inherited whatever qualities are implied in these processes."¹ To take an individual apart, and strip him of all that he owes to his surroundings, is to abolish the man and substitute for him a mere abstraction. We must, on the contrary, consider him as native of a particular country, as citizen of a particular state, as member of a particular family, as characterized by a certain education, culture, and religion, as engaged in a certain profession, pursuit, or occupation. Every man is thus more than his wants, in that he is sharer in a life larger than his own. He is at once his own wants, and the living embodiment of the life around him. It is the individual who gives life to the material which society furnishes, but it is only as reproducing that material that life has any meaning or value.² To live the moral life is to find in our actions at once the satisfaction of our wants, and the adequate expression of that larger life in which we are partakers.

It is here that we find an element common to all possible relations of man to man, infinitely various as these relations may seem to be, *i.e.* each individual seeks to satisfy his wants and to realize his aims, and these wants cannot be satisfied, these aims cannot be realized in isolation.³

II. Security for his life and for the conditions of living is man's primary necessity; and in this necessity primitive society had its origin. It is alien to our present purpose to review the evidence which bears upon the original constitution of the earliest groups, and to seek to decide between the claims of the theory of the horde and the patriarchal theory. That every such group is based on kinship is admitted; and the balance of evidence goes to show that however it may have been in prehistoric times, at the dawn of history the patriarchal was the typical form of society.

Man, as he first presents himself to us, is in a state of transition.

¹ Leslie Stephen, *The Science of Ethics*, p. 95, cf. p. 135.

² Hegel, *Werke*, ii. 343.

³ Mohl, *Gesch. d. Staatswissenschaften* . . . , i. 88 sqq.

He is a nomad ; but the beginnings of agriculture are not unknown to him. He is forced at times to a temporary settlement,—an impassable river or a warlike tribe lies in his path, and he must take in and break up for his sustenance a patch of ground until circumstances change and allow him to resume his wanderings. Such labour is given up at the first opportunity, as being not only extremely distasteful, but extremely insecure.¹ It is, however, in this change from a nomad to a settled life that all civilisation worthy of the name has its origin. In the hunting stage man lives from hand to mouth. He has no home but the hunting-ground ; no property but his weapons. He seeks to gratify his immediate wants ; his activity has no permanent result. In the pastoral stage he becomes associated in a common purpose ; and his activity is not wholly expended in its exercise, for he seeks to tame rather than to destroy. The agricultural stage marks a still further advance ; for to agricultural pursuits permanence of settlement is a necessary condition, and by this condition the agriculturist's whole life and character is moulded and informed.²

These gradual changes belong to what we may call the first period in constitutional history,—the period, namely, when men band themselves together in groups for mutual help and protection. And this period is itself susceptible of division ; for, as migratory habits are abandoned, and districts become permanently settled, the original bond—the bond of kinship—gives way, and men are associated no longer in virtue of community of blood, but in virtue of community of ground. We do not, of course, mean to affirm that the former type of group is entirely displaced by the latter. Traces of the old order survive in the new ; and institutions based on kinship subsist side by side, and frequently conflict with institutions based on common occupation of a district ; nor does it infrequently happen that the association founded on community of blood assumes the form of a state without passing through any intermediate stage.³

III. The works of Sir Henry Maine have made us familiar with the features of early societies. In the period of the associations for mutual protection and assistance, of which we have spoken above, "one man was always the kinsman, the slave, or the enemy of another, and mere friendship and affection would, by themselves, create no tie between man and man."⁴ Each group constituted the world for its members. Expelled from it, the outcast had no right, no home, no God ; for its custom was his law, his religion, his morality. If he were seen lingering about

¹ Schrader, *Sprachvergleichung u. Urgeschichte*, p. 358. He quotes, as an excellent illustration of this state of things, Xenophon's account of the *καρπαια* (*Anab.* v. 8, 8).

² Lotze, *Mikrokosmos*, 3rd edit. ii. pp. 426 sqq.

³ Post, *Der Ursprung d. Rechts*, p. 11.

⁴ Maine, *Early Hist. of Institutions*, p. 146.

his old haunts, he was to be hunted down and slain like a wolf ;¹ while beyond the limits of the group he found none but deadly enemies, who were bound to destroy him for their own security. Each member lived in the group, and for it. His acquisitions were its wealth ; his strength and courage were its power. In its well-being and security he found his own. And as the group was entitled to the produce of its members' exertions, so it was responsible for their acts ; it bore the punishment or exacted the penalty.² Within such a group there was no room for the non-conformist or the malcontent ; while apart from it life was impossible, for it embraced all sides of life.

The group thus furnishes its members with the only possible satisfaction of their aims. In the form of custom, it gives them law, morality, and religion, which they reproduce more or less unconsciously in action. And the longer men live the customary life, and think the customary thoughts, the more their life sets and hardens, the more their character becomes fixed. Duty, incumbent upon all, more and more excludes individual caprice from the field of action.³

But, in the process of its self-expansion, such a group must overstep its original boundaries ; and if it come into collision with other groups, similar in character, the only possible issue is a struggle for existence. The results of such a struggle vary as the powers of the combatants balance. The supremacy established by the conqueror may be such as to crush all individuality in the conquered, or may consist merely in the imposition of contributions in money or services ; or the parties may be so equally matched that the conflict may end in a compromise on the basis of mutual concession.⁴ But however this may be, neither of the conflicting groups any longer embraces every side of ethnic life, and the individual finds himself the sport of antagonistic interests. A man is no longer member of but one association, which provides for his wants, domestic, political, and religious. For, as society grows, as its relations become more complex, as the groups which it includes increase in number, a greater variety enters into the daily life of its members,—a variety which seems the more inexhaustible as that daily life widens and deepens.

". . . From this wave-washed mound
Unto the furthest flood-brim look with me ;
Then reach on with thy thought till it be drown'd,
Miles and miles distant though the last line be,
And though thy soul sail leagues and leagues beyond,
Still, leagues beyond those leagues, there is more sea."

¹ Wilda, *Das Strafrecht d. Germanen*, pp. 279 sqq. To this denial of all rights to an alien, and consequently to an outlaw, Ihering attributes that horror of exile which was so marked a characteristic of antiquity, *Geist d. Röm. Rechts*, I. (4th edit.), p. 228.

² Maine, *Early Law and Custom*, pp. 252, 264 ; *Ancient Law*, p. 127.

³ Cf. Bradley, *Ethical Studies*, Essay I., and note B. ⁴ Post, *ubi cit. sup.*

It is at this point that the discrepancy between law and morality becomes felt. In the primitive communities of which we have spoken, there could be no such discrepancy, for the interests and aims of the community and of its members were absolutely identical, and consisted solely in seeking to secure immunity from aggression and internal peace,—the conditions of self-preservation and self-expansion. No less than the primitive community, the state is concerned with the security of its citizens, but these citizens differ widely from the members of the primitive community. Owing to the constitution of the state, founded as it is on conquest or compromise, or evolved from a simpler form, the citizen belongs not only to it, but to other spheres which it partly includes. *E.g.* a man may be a Roman Catholic, a negro, and an English citizen; and the interests of religion and race demand consideration as well as the interests of the state. It may be his to choose whether he will yield to the commands of authority, or obey, like Antigone, the unwritten laws of the eternal gods.

Here, then, we can clearly distinguish between morality and law. In so far as the state embraces the life of its subjects, that life is within the domain of law. Among the Jews, for example, the cultus was ruled and regulated by law, because the state was founded upon religion; whereas the most civilised of European states concern themselves almost exclusively with the political life of their subjects, and hardly at all with their religion or customs or domestic economy.¹

It is thus in the course of the development of society from the early community to the state, that we find the explanation of the diversity of laws and customs, and of the rapidity with which the old passes into the new order. A duty, the observation of which is incumbent upon all the members, and necessary to the subsistence of the early community, becomes, in a later stage of social evolution, a crime against the state.² Thus law is always changing as the needs of society change. And as life widens, so the ideal of morality expands. To be moral is to live the life around us,—to reproduce in our actions the life of the spheres within which we dwell. If we are to be moral, we must disregard desires wholly self-centred, and seek adequately to represent the various circles of surrounding life. "What happens is not that the individual surrenders himself to an outside comprehensive will, but that he gradually learns to lay aside the isolating attachments which kept him apart, and discovers that he and others are really one."³ Morality is thus an ideal,—a demand that is never satisfied,—for the contradiction between the individual and society,

¹ Post, *ubi cit. supra*, p. 25.

² Lightwood, *The Nature of Positive Law*, pp. 328–330; cf. Post, *ubi cit. supra*, p. 19.

³ Wallace, "Ethics and Sociology" in *Mind*, April 1883, p. 244.

in the widest sense, is ever present, and is indeed condition to all future advance. This ideal is never realized in the sphere of morality. It is in absolute self-surrender,—it is in religion only that the contradiction disappears.¹

P. J. H. G.

LEGAL COSTUME.

THE proposal made at a recent meeting of the Faculty of Advocates to revive the practice of wearing bands by the members of the Scottish Bar,—a suggestion defeated by a large majority,—affords a fitting opportunity for an inquiry into the history of the whole question of legal costume in this country. Professional habiliments at the present day consist of a gown, a wig, and a white necktie,—the latter being represented in the apparel of the English barrister by bands. It is proposed in the following paper to trace the history of the adoption and use of these three articles of official dress in the order named.

An ordinance and resolution of the Parliament of Paris, dated March 1344, divided the advocates of that time into three classes, viz. consulting advocates, pleaders, and listeners or probationers. The consulting advocates were of at least ten years' standing at the bar, and wore a robe of black silk covered with a scarlet mantle lined with ermine. The pleaders wore a violet gown, and the probationers a white one. Pasquier says that the advocates were held in such high honour by Parliament, that they were given the true mark of the magistrates—a furred cap. Quicherat, however, in his *Histoire du Costume en France*, declares that in the Middle Ages there was constant change in the colours of the robes of all functionaries, with the exception of those of the Parliament of Paris, whose habiliments were always scarlet. The robes of the magistrates and advocates were in the fourteenth century parti-coloured. Thus, in 1378, the colours were white and violet; two years after the entry of Charles VI. into his capital, the robe was white and green. It was green and crimson in 1389; in 1418 entirely blue; plain blue during the government of the English; crimson and blue in 1437, when Charles VII. re-entered into possession of Paris; while in 1468 the advocates of Bourgogne had robes of black velvet. Quicherat suggests that this variation in the colour of the robes was due to the fact that the advocates often adopted the livery of their more renowned clients. At a later date, the counsellors, procureurs, and advocates of the King in the Parliament of Paris were all attired in scarlet robes with furred caps,—the presidents adding a cloak of the same colour, and that of the first president being ornamented with gold lace and white fur. This was the legal costume in 1514, for when

¹ Cf. Caird, *Philosophy of Religion*, pp. 290 sqq.

Mary, sister of Henry VII., King of England, made her entry into Paris, the Parliament resolved to go to meet her in scarlet robes and furred hats; and the president commanded the advocates "to join themselves to the court, well-mounted and clothed in robes of scarlet and furred hats." A few years later, another royal entry was made into Paris, when the Parliament joined in the state ceremonies which then took place. Mr. Mackay, in his learned work on the *Practice of the Court of Session*, thus refers to this incident:—"On the 31st December 1536, James V. of Scotland, in person, made a solemn entry into Paris on the occasion of his marriage with the Princess Magdalene. He was received in state by the whole of the officials of the Parliament of Paris; and a curious document has been preserved, written by Monsieur Pierre Liset, the first president of that court, in which he protests that the order of his reception by the judges of that body in their red robes and velvet cloaks and hats, which was an honour usually conceded only to the kings and queens of France, should not be drawn into a precedent."

As a side-light on legal history, it is somewhat curious to note that just as the Church opposed with vehemence the wearing of beards by ecclesiastics, so did the Parliament of Paris resent such hirsute appendages on the part of its members or officials. It may be stated that beards came to be proscribed in the Church when Pope Clement VII. shaved his as a mark of sorrow after the sack of Rome. The bench and bar followed the Church. But in the course of time both ecclesiastics and lawyers found means of evading the rules against the wearing of beards. Prelates put their chins under the safe keeping of their secular sovereigns. Henry II. permitted certain eminent churchmen to wear beards, and excused them to their indignant chapters on the ground that he proposed employing them as ambassadors,—beards being evidently regarded as a necessary adjunct to diplomatic dignity. Francis Olivier, elected Chancellor of France in 1536, was received by the Parliament of Paris only on the express condition that he would shave off his beard. Others after him only escaped from this unvirile shearing by means of royal letters patent granting them liberty to wear their beards. At a subsequent date, by a turn of the whirligig of fashion, it was reckoned a failure in the becoming gravity of a magistrate or pleader if he appeared in public bare-faced. Monsieur Liset was therefore, it is not too much to say, sensitive overmuch not only as to beards, but as to historic precedents for the ceremonial processions of his august court.

It was exactly a year after this royal entry of James V. into Paris that the Scots Parliament passed an Act for the institution of the Court of Session and College of Justice; and one might readily have expected that His Majesty, after witnessing all the brave show made by Monsieur Liset and his colleagues, would have, among the provisions in that Act, taken some security for the

honourable apparelling of the members of his new court. James was conversant with all the forms and customs of the Parliament of Paris, which undoubtedly was the model of our Scottish Supreme Court; as was also Albany, who had long urged the placing of the judiciary of Scotland on a sounder footing than had up to that time existed. Nothing, however, appears in the first Court of Session Act, as we shall have occasion to see afterwards, regarding the costume of either judges or advocates.

It may be well to inquire what at this early period were the robes possessed and worn by the Bench and Bar of England. The chancellor and judges in the Court of Chancery were attired in scarlet robes edged and lined with white fur,—the chancellor having in addition a scarlet ermine-lined mantle. The masters in Chancery had mustard-coloured robes. The judges of the Court of King's Bench were robed in scarlet, with tippets and mantles of the same colour. The Baron of the Exchequer, who presided in the Court of Exchequer, had scarlet robes, but the two judges who sat along with him wore mustard-coloured gowns. Serjeants, who, like the judges, wore coifs on their heads, had long flowing gowns, worn without any belt, parti-coloured, blue and green. Barristers had likewise parti-coloured gowns, but no coifs. It is suggested both by Planché and the author of the article on "Costume" in the *Encyclopædia Britannica*, that these parti-coloured gowns were a relic of the time when pleaders adopted the livery of their powerful clients,—a suggestion, it will be remembered, also made by Quicherat for a similar practice in France. But quite another view was taken by the Lord Chief Justice of England in Queen Elizabeth's time. In the thirty-sixth year of the reign of the good Queen Bess, the Chief Justice, addressing some newly-created serjeants, thus sententiously spoke:—"By the parti-coloured garments, being both of deep colours, and such as the judges themselves in ancient times used (for so we receive it by tradition), is signified soundness and depth of judgment, an ability to discern of causes, what colour soever be cast over them, and under or with what veil or shadow soever they be disguised." We are afraid that the Chief Justice's strong point was legendary faith and not legal archæology.

With the light thus shed on the history of the Courts of France and England, let us endeavour to trace that of the Scottish Courts, so far as costume is concerned. The earliest hint we have of any distinct professional dress being enjoined or adopted in Scotland, is found in an Act of the Scots Parliament passed in 1455, in the reign of James II. That Act ordained that the Lords of Parliament, which then constituted the Supreme Court, shall have "ane mantil of reide, richt-swa opened before, and lyned with silke, or furred with cristie gray grieces or purray, togidder with ane hude of the samin claith, furred as said is. . . ." And it was further ordained that "all men that are fore-speakers for the coist (hired

advocates) have habits of greene, of the fashion of a tunikil, and the sleeves to be open as a talbert." Lords who appeared without their robes were to be fined in £10, and advocates in £5. This Act was ratified by 13 James II. in 1457.

Now there can be little doubt that the robes of the Lords of Parliament thus prescribed were similar to those worn at that period by the Parliament of Paris, and that their form and colour were adopted from France, with which country Scotland even then had the closest communication. It has been suggested that the green tunic of the advocates was an imitation of the mantle generally worn by the knights of that age. Metrical romances of the beginning of the fifteenth century speak of knights wearing gowns over their armour:—

"Gay gowns of green
To hold their armour clean,
And keep it from the wet:"—

A use to which sporting Oxford undergraduates are said to put their gowns in hiding their pink coats and virgin buckskins ere stealing out of bounds to the exciting chase. But we think the use of the green tunic by advocates in Scotland need not be traced to the customs of the knights. Green, as we have seen, was the colour of the habits of advocates in several of the Courts of France at the end of the fourteenth century, and the pattern must have been brought thence to Scotland along with the imposing garments given to the Lords of Parliament.

The next remarkable date in the legal history of Scotland is 1537, when James V., by an Act of the Scots Parliament passed in that year, instituted the College of Justice and placed it on its present footing. Nothing, however, appears in that Act regarding the robes of either the "Lords" or of the advocates, clerks of Signet, and other officials mentioned. So far as can be discovered, there is no legislative or other interference with the costume of either the Bench or Bar till the time of James VI. That sapient monarch, after his removal to England, on succeeding to the throne of the Southern Kingdom, conceived an aptitude for tailoring, and developed a state policy, one of the outcomes of which was a series of sumptuary laws. The excuse for those enactments, of which specimens are to be found in the statute books not only of England and Scotland, but of the various continental states, was the repression of luxury and extravagance in clothing, and the maintenance of the external distinctions of rank. The Scottish Solomon, as he delighted to be called, induced the Scots Parliament to pass the Act 1609, c. 15, which provides for the suitable apparelling of the judges, advocates, clerks of Session and Signet, kirkmen and others, according to an order to be "sent in wrytt by his Majestie to his Clerk of Register," which order "shall be a sufficient warrant to him for inserting thereof in the buikes of Parliament, to have the strength and effect of ane Act thereof." The Act sets

forth that "because a comelie, decent, and orderlie habite and apparrell in the judges of the land, is not onely ane ornament to themselves (being a badge and marke for distinguishing them from the vulgar sort), but the same also breeds in common people that reverence and regard that is due and proper for men in these places: And this being a custome universallie observed almaist through all Europe, the want whereof is greatlie censured by strangers resorting in these parts: The saids Estaites, therefore, upon infinite proves they have of his Majestie's maist singulare wisdom in all his directions, and of his gracious love and affection to this his native kingdome, have, in all humilitie, referred to his Highness, awne appoyntment the assigning of any sik severall sort of habite and vestement as shall be in his majestie's judgment maist meet and proper, as well for Lords of Session, being the supreme judges in civill actions, as for all other inferior judges of the lyke causes; as also for the criminall and ecclesiasticall judges, and for *advocats, lawyers, and all others living by law and practice thereof*; that sa every ane of these people may be knawn and dignosed in their place, calling, and function, and may be accordingly regarded and respected."

The order above referred to is contained in a letter addressed to Sir John Skene, Clerk of Register, and is dated 16th January 1610. This missive, which is printed in the *Maitland Miscellany*, was submitted by Sir John Skene to the Secret Council, which ordained it to be inserted in the Register of Parliament, and it then possessed all the authority of an Act of Parliament. A proclamation was thereafter issued, dated 30th January 1610, in accordance with the practice of thus publishing all Acts of Parliament. The proclamation in the outset acknowledges the King's "singular wisdom in all his princelie directionis, and his gracious love to this his antient and native kingdome," in reference to the apparel, "alswele for the Lordis of Sessioun, being the supreme judgis in civile actionis, as for all utheris inferiour judgeis in the like causes, as also for the criminal and ecclesiastical judges, and for advocats, lawyris, and all utheris leving by law and practize thair of." Then followed the King's order, which ran:—

"*First*, That the Chancellour of this kingdom weir, according to his awne discretioun, a ritche fair gowne of some sad or grave cullour, conforme to his conditioun, estaite, and rank, and that in his sitting in Sessioun, Counsell, Conventioun, and Articles: bot gif he be a nobleman, in his ryding to the Parliament that he weare the habite dew to his rank and degrie of nobilitie: That the President and remanent ordinarie Lordis of Sessioun sall weare a purpoure cloath gowne, faced all about with reid crimosine satyne, with a hude of purpoure lined with crimosine satyne also according to the modell and forme of a gowne send down be his Maiestie to be a patrone for all gownes of ordinarie Sessionaris, onlie the Presidentis gowne salbe faced with reid crimosine veluott and the

hude lynit with reid crymosine veloutt; and the saidis President and Sessionairis sall weare these habiteis upoun the streitis of Edinburgh during the tyme of Sessioun, and at all such tymes as they come to counsell, conventioun, or uther meetingis; and the four extraordinarie Sessionairis to weare blak gownes of velvott, satyne, or some uther silk as pleasith thame, lynit with matrix or some uther blak lyning at their pleasour: That the advocatis, clerkis of the Sessioun and Signet sall haif thair gownes of blak lynned with some grave kynd of lyning or furring: And in like manner, that the Justice Generall quhen he sittis in his criminall courte and seate of judgement sall weare a reid scarlett gowne faced with quhyte ermine, with a hude of the same, lynned alsua with quhyte armyne: And the Justice Depute and Justice Clerk principall sall weare blak gownes with hudeis faced and lynned with reid crimosyne satyne as is afoirsaid; and the clerk of the same court sall weare a blak gowne lynned with blak furring in that same forme as the Clerkis of the Sessioun: As alsua that the Doctouris of the Civile Law and all Commissionaris sall wear gownis of blak faced on the breist and nek with black velvott."

The last mention made of court costume in any statute is in that of 1672, c. 16, which reformed the Court of Justiciary, and it enacted, "That for the splendour of the court, all the judges sitt in red robes faced with white,—that of the Justice Generall being lined with ermine for distinction from the rest." It would appear that "the splendour of the court" was not maintained by the advocates practising in the Justiciary Court, for in the minutes of the Faculty of 19th November 1675 there is this entry:—"The Deane of Facultie having represented the inorderlie way which was used in ye criminall court, and yat ye Lords recommended to the advocates to appeir in yair gownes; which being considered, all advocates were desyred to appear in yr gowns."

It does not appear, so far as we have been able to discover, whether any of the sumptuary laws passed by the Scots Parliament granted immunity from their provisions to the wives or daughters of the legal luminaries of those days. The French Government on at least one occasion exhibited a tenderness quite extraordinary towards not the sex in general, but the wives and daughters of advocates, although mayhap the females thought differently, as by legislative enactment they found themselves placed, so far as dress was concerned, unreservedly at the mercy of their fathers and husbands. An edict of 1700 authorized the use of gold and silver in the adornment of the costumes of nobles and functionaries invested with important charges; but interdicted the employment of such vain luxuries, and indeed of any extravagant materials or ornaments, by burgesses, and all persons who sold, trafficked, or worked with their hands. The edict specially included the wives and daughters of recorders, notaries, procurators, commissaries, and court officers. "As to the female members of

advocates' households, they were not included in the interdict to other extent than seemed meet in the wisdom of their fathers and husbands." "What an honour," exclaims Quicherat, "for the order of advocates!" This was tantamount to a permission to the wives and daughters of advocates to dress as fancy and taste dictated, for true wisdom is exhibited by every advocate when he swears that the garments, whatever they be, with which his womenkind are adorned, are beautiful, are modest, are tasteful, and are becoming—exceedingly!

In England there are numerous pictures, brasses in churches and cathedrals, monuments and illuminated parchments, from which a tolerably correct history of legal costume may be obtained; but in Scotland, unhappily, few such sources exist, or, at any rate, remain available, from which the evolution of the robes worn by men learned in the law may be drawn. And the majority of these have reference only to the official garments of one section of the College of Justice, viz. the senators. Before proceeding to refer to such ancient pictorial sources as are within ready reach, it may be well to notice the most recent, and to point out the historical inaccuracy of some of its details of costume. We mean the painted window at the south end of Parliament House, representing the opening of the Court of Session by James V. It is to be remembered that the Act of Parliament instituting the Court of Session did not prescribe any robes; but we question whether any of the legal dignitaries embraced in the picture are represented as wearing the habits enjoined by the earlier James II. or the later James VI. The Chancellor, Gavin Douglas, Archbishop of Glasgow, is attired in his archiepiscopal robes, covered by a splendid-figured scarlet mantle. This may correspond in some measure to the red mantle lined with silk and bordered with fur of the Act of James II.; but it is very distinct from James VI. Chancellor's robe, which was to be "a rich fair gown of some sad or grave colour." The President, Alexander Myln, Abbot of Cambuskenneth, is attired in a scarlet gown faced with white ermine, and with a hood of the same, which is the robe prescribed by James VI. for the Lord Justice-General,—the Lord President's robe, according to James VI., being a purple gown faced with crimson velvet, and a hood of the same colours. The Lord Justice-Clerk, Thomas Crawford of Oxengrange, is represented as wearing a scarlet gown with a white hood,—in fact, a gown much like that of the Lord President, but without the ermine. James VI. provided for the Justice-Clerk a black gown, with hood faced and lined with satin; while the later Act of 1672 appointed all the Justiciary judges to sit in red robes faced with white. Sir Adam Otterburn, King's Advocate, and Sir James Foulis of Colinton, Lord Clerk-Register, exhibit dark green, almost black, gowns, with gold lace facings,—at best a reminiscence of James II. Advocate's robe. None of the figures have wigs; all of them wear their own hair, which is short.

We leave the window with the remark that it is a pity it should not have approached more nearly to historical accuracy and consistency than it seems to do.

In the Advocates' Library there is a curious drawing, representing the "Funeral Procession of John, Duke of Rothes, Lord High Chancellor of Scotland, on 23rd August 1681." This drawing, which is carefully executed in ink by "Mr. Chalmers, Herald Painter to James VII. of Scotland," and said to be "a memorial of one of the most splendid exhibitions of Scottish national pomp and parade extant," throws some light upon contemporary legal costume, though from lack of colour it is not so valuable as it might otherwise have been. It may be said of the figures generally, and they number several hundreds, that they all wear a round, low-crowned, broad-brimmed hat, such as that commonly identified with the Puritans, and that all have full-bottomed wigs, and bands or cravat-ends hanging down the breast from their neck-bands, the bands of some classes being, however, slightly shorter than those of other ranks. The Writers to the Signet have a plain gown without sleeves,—a vertical opening or slit being left for the arms. Advocates have a gown ornamented with bows of ribbon or "frogs" down the front, slashed sleeves reaching to the elbow, also "frogged." The clerks of Council and Session have gowns of the same shape as the advocates, but without ornament, and the sleeves are not slashed. The macers have gowns exactly like those of the advocates, but without "frogs." The Lords of Session have gowns with three bows of ribbon in front, and over the gowns a tippet or small mantle—corresponding to the ancient hood—edged with some material probably intended to represent ermine or satin. The gowns have voluminous sleeves coming down to the wrists. The Lord President's gown does not differ in shape or apparent ornament from that of the other judges. The Lord Register has a gown ornamented all over with "tags," which may be regarded as gold lace. The Lord Justice-Clerk has a gown and tippet of the same shape as those of the other Lords of Session, but it wants the bows in front, and the tippet is plain. There is, however, a curious ornament at the side, which may be a pocket. His gown is alone in this respect. The Lord Advocate has a gown exactly like that of the Lord Register. The only other figures which need be particularized are the doctors of physic and chirurgeons, who have gowns without sleeves, hanging as a mantle from the shoulders, and apparently attached to a small tippet or broad collar.

Now, so far as one may judge from a pen and ink drawing, there does not seem to have been in 1681 any great departure from the costume prescribed to the various members of the College of Justice by James VI. in 1610. Apparently the judges' gowns correspond with those described in the King's letter, and it is quite consistent with their outward semblance that the advocates' gowns may be lined with "furring." There is, however, a distinction—not meant

by James VI.—between their gowns and those of the clerks of Session and the Writers to the Signet.

The only other pictorial authority at command is the magnificent series of portraits hung in Parliament House. Now, looking to these, it cannot be said that, so far as the judges' robes are concerned, there has been any pronounced departure from the pattern described by James VI. The only variation seems to be that, towards the end of last century, the bows of ribbon in front of the gowns, and on the tippet or hood, have given place to a cross of satin. Is this cross only a tailor's variation of the bow, or is there some hidden meaning in the cross? Two at least of the judges at present on the bench have discarded the cross, which, we are inclined to think, was a robemaker's whimsical mistake; and their plain robes are in more perfect accord with the original pattern than the oddly ornamented gowns of the other senators.

There are few portraits of advocates in the collection, and only one, or at most two, in official garments. Sir Thomas Hope, King's Advocate in 1627–40, has seemingly a black robe; but so high is the picture hung, and so dark is it, that we fail to make out if it be a gown in the present acceptation of the word. The next portrait of a begowned advocate, and the only one on which a pronounced opinion can be given, is that of Vice-Dean Crosbie. His era may be said to embrace the last half of the eighteenth century. The gown in which he is represented as pleading is like that at present worn,—variously alleged to be a simple academic gown, the gown of a Master of Arts, and the gown of a Doctor of Civil Law. Be that as it may, it is unquestionably a departure, as to style and shape, from that authorized by the Legislature, and that which apparently was worn in 1681.

In England, as in Scotland, there has been a change in the style and character of the gowns of the members of the Bar. This is more especially the case with the serjeants, who, it will be remembered, at one period appeared in court in parti-coloured robes. It is stated that the late Chief Baron Pollock, in answer to a question put to him by Dr. Dimond respecting the black gowns of the present day, replied that the Bar went into mourning on the death of Queen Anne, and never came out again. Whether this was a grim pleasantry on the part of the Chief Baron, or whether it may have likewise indicated the reason of the change in the professional costume of the Scottish Bar, it is not for us to determine; but there is no record of when and how this change took place. Certainly no parliamentary enactment authorized the variation; and the minutes of the Faculty of Advocates have been searched in vain for such sanction. And the only suggestion that has ever been made for the change is "possible convenience and considerations of economy!" Some of the clerks of Session at present do not wear gowns, but that must be a modern innovation, as we can find no authority for their discarding the official robe enjoined by James VI.

There seems to be no doubt that the Writers to the Signet wore their gowns, in terms of the statutory authority, for a long series of years. When they ceased to don this special professional garb in court is not clear, but it must have been some time between 1681 and 1750, for in the Acts of Sederunt of 23rd June of the latter year, there is a statement to the effect that the Writers to the Signet "desired to wear their gowns in the Session House, according to the ancient custom, if the Lords would approve of their so doing, to which the Lords made no objection." Probably the Writers to the Signet resumed the gown in court for a time, but the custom has again fallen into desuetude. Members of the Society, however, do possess gowns which they put on on certain occasions, and we noticed one gentleman the other day adopting his as a passport to the Justiciary Court during an important trial, and that gown, if in nothing else, in the provision of a slit for the arm instead of a sleeve, corresponded to those in the picture of Chancellor Rothes' funeral.

(To be continued.)

MARRIED WOMEN'S PROPERTY ACT, 1877.

STOCK OF BUSINESS CARRIED ON BY MARRIED WOMAN IN HER OWN NAME.

THE Married Women's Property (Scotland) Act, 1877, had for one of its objects to secure to married women exclusive right to what they might acquire by their own industry. It provided (section 3) that "the *jus mariti* and right of administration of the husband shall be excluded from the *wages* and *earnings* of any married woman, acquired or gained by her after the commencement of this Act, in any employment, occupation, or trade in which she is engaged, or *in any business which she carries on under her own name*, and shall also be excluded from any money or property acquired by her after the commencement of this Act through the exercise of any literary, artistic, or scientific skill; and such wages, earnings, money, or property, and all investments thereof, shall be deemed to be settled to her sole and separate use; and her receipts shall be a good discharge for such wages, earnings, money, or property, and investments thereof." This provision is not altogether superseded by the provisions of the more sweeping Married Women's Property Act of 1881. There is a similar provision in the English Married Women's Property Act of 1870, from which, indeed, the above provision has been borrowed. One of the many questions of which these Married Women's Property Acts have been so fruitful is, whether, in giving to a married woman carrying on business "in her own name," or "separately from her husband" (the former being the expression in the Scottish, the latter the expression in the

English Act), the exclusive right to her earnings in that business, the enactment gives right to anything more than the bare earnings, or whether it does not also give right to the stock-in-trade, without which these earnings cannot be made. The English case of *Ashworth v. Outram*, L. R. 5 Ch. Div. 923, has been represented at least as deciding that the enactment does give right to the stock or capital, as well as the earnings acquired by the use of it. This undoubtedly was the view taken by Lord Coleridge, one of the three judges in the Court of Appeal. The provisions of the Act, his Lordship said, "must carry the protection of the wages and earnings to those things which are necessary to make the wages and earnings which are to be protected. The effect of the Act, if fairly construed, is to protect the trade or business of the married woman which she carries on separately from her husband; for without the protection of the trade itself it is manifest that the protection of the wages and earnings in the trade is impossible. . . . It is plain that to give, I do not say a liberal or loose, but a rational construction to the Act, the protection afforded to it must be extended so far. . . . Without in the least infringing the old law, simply applying the Married Women's Property Act to the well-known principles of the law, I come to the conclusion that the stock-in-trade which was the means of carrying on this business, and without which the business must have come to an end, and there could be no wages and earnings, is protected in this case." His Lordship further observed, that in construing the provisions of the class of Acts of which this formed one, "the Courts have held that whatever is fairly necessary to effectuate the protection which is the object of the Act must be held to be given to the words of the Act itself." In *Fraser on Husband and Wife*, ii. 1513, the case is represented as showing that if the husband consents to his wife engaging in a separate business, "the profits and stock-in-trade belong to herself in virtue of the Married Women's Property Act."

The question whether the stock-in-trade as well as the earnings was protected by the provision of the Scottish Act of 1877, has now been decided by the Court of Session in the case of *Ferguson v. Willis, Nelson, & Co.*, Dec. 4, 1883, 21 Scottish Law Reporter, 170. The Court held that the stock-in-trade was not protected. A woman who carried on business as a milliner married in 1872, no marriage-contract being made. She continued to carry on the business under her own name, free from any interference on the part of her husband. The husband and wife carried on each their separate businesses, the one of an ironmonger, the other of a milliner, just as independently of each other as if they had been strangers to each other. The earnings made by the wife appear to have been devoted to the maintenance of the family. The husband was sequestrated in 1882. The trustee on his sequestrated estate claimed right to the stock-in-trade of the wife's business. The

Sheriff-Substitute, founding entirely upon the provision of the statute, and on Lord Coleridge's interpretation of the similar provision of the English Act and his Lordship's reason for such interpretation, held that the stock-in-trade belonged to the wife, and did not fall into the husband's sequestered estate. The First Division (Lord Deas dissenting) reversed, and for the following reasons: At the date of the marriage, the stock-in-trade, like the rest of the wife's personal estate, as the law then stood, passed to the husband as his absolute property. There was no evidence of any arrangement being made by which that effect of the marriage was taken off or forfeited in any way prior to the passing of the Act of 1877. The business, no doubt, was carried on as a separate business, but the rule of law is, that although it is carried on in a separate name, the wife, except in special circumstances, such as desertion, is held in law to be carrying on that business as her husband's agent. But for the statute, even the earnings would have belonged to the husband. In stating what is to be protected by the statute, the wages or earnings made in the business are mentioned in clear and precise terms. If the stock-in-trade had been intended to be protected as well, it would have been easy to have said so in equally express terms. Nor can it be said that the right to the stock-in-trade is covered by implication. It would be a strange implication which would embrace in earnings the stock employed in the business. It would have been strange if such a provision had been made. Under the law as it stood, although the stock-in-trade was the separate estate of the wife, she would not have had right to the earnings or profits, and the provision of the statute was necessary to protect these. Further, it cannot be contended that the wife has an absolute right to carry on business in her own name. The husband may put a stop to it. It is only, however, so long as the earnings are made that the statute operates. No matter from what cause the earnings cease, the moment they cease the operation of the statute ceases. Suppose the earnings cease, how can it be contended that the stock-in-trade is protected by operation of the statute, the operation of the statute having ceased? Lord Deas, in dissenting from the decision, did not rest his opinion upon the provision of the statute, but upon this,—that the business, with the acquiescence of the husband, was carried on in the wife's maiden name after the marriage just as it had been before the marriage, and there was sufficient evidence of an implied nature to come in place of an express transfer by the husband to the wife.

In this case the stock had been the property of the married woman, and had been used by her in the business she carried on before the marriage; consequently there was a hardship to her, or rather to her creditors, in the stock being thrown into her husband's bankrupt estate. This, however, is one of the hardships of the law as it stood prior to the Act of 1881, and which the Act of 1877 was not meant to redress. If the Act of 1877 had been found to

protect the stock-in-trade, it would do so although the stock had never belonged to the wife as her own property, but had been given by her husband; and this would be equally hard upon the husband's creditors.

The views of Lord Coleridge upon the principle of construction to be applied to the Act are fully as important as the decision to which it led him in the case of *Ashworth*. These views seem to us quite untenable. Surely it is the part of the Legislature, not of the judge, to make such provisions as are necessary to effectuate the protection intended or supposed to be intended by the statute. Any other view is to commit to the judicature the duty not of exposition and application, but of subsidiary legislation. This is not to expound, but to expand the provision of a statute, and to expand it like a foreign telegram. In this mode of reading a statute some of the best established principles of law might be subverted without design. Once adopt such a way of reading a statute, it is difficult to see where we are to stop. Going one step farther, it might be said, with regard to this statute, that it gives an implied right to a married woman to carry on a business or otherwise employ herself without her husband's consent; and, as the Lord President took occasion to remark, this is not a right which it can be reasonably contended she possesses. Indeed, in dealing with a similar provision in a statute of Illinois, an American judge has gone this length: "The right to receive and use her own earnings uncontrolled by her husband is conferred in express terms. The practical enjoyment of this right presupposes the right to appropriate her own time. The right to take and possess the wages of labour must be accompanied with the right to labour. If the husband can control these, then the statute has conferred a barren right." This is an illustration of the extent to which one may be led by acting on the principle that the Court is entitled to make every provision which they may think is necessary to effectuate the protection intended by the statute, although the Legislature has not thought proper to make it. The Court of Session has wisely refrained from going beyond the express provision of the Act. There has been a good deal of speculation as to the far-reaching effects of these Acts altering the patrimonial rights of spouses; and the decision of Mr. Justice Chitty in the case of *Mandars v. Harris*, recently noted in this journal, is an instance of the extravagant length to which one may be carried by going beyond the provisions of the Act and adding inference upon inference. It is easy to arrive at far-reaching effects if we resort to a far-fetched construction.

This case of *Ferguson v. Willis, Nelson, & Co.* suggests the necessity, we shall not say of caution in dealing with English authorities, but of attending to the principles upon which they have been decided. As was observed by the Lord President, the inferior judge had been in some degree misled by the English case of

Ashworth above cited. His Lordship pointed out that on looking into the case it was to be seen that it afforded no guide to the Court in the question before them in *Ferguson's* case. In the first place, in *Ashworth* there was no question of insolvency. The wife possessed a going business, and the stock and capital of it, at the date of the marriage. The husband allowed her to continue the business as before up to the date of his death, upon which event his next of kin claimed it as against the widow. On this point Vice-Chancellor Malins said: "The husband did not die insolvent. There is no claim by creditors, and the next of kin can only take that which he could himself have claimed. If, therefore, instead of exercising his rights and insisting on breaking up the business and selling the stock-in-trade and getting in the debts, he acquiesced in his wife continuing the business, I have then to consider what is the effect of that acquiescence." In the second place, what the majority of the English Court proceeded upon was not the Married Women's Property Act, but the English equitable principle of a wife's "separate use," by which a husband may be regarded as a trustee for his wife,—a principle of which the law of Scotland knows nothing. This is evident even from the opinion of the Vice-Chancellor, but still more from what is said by James, and Baggallay, L. J.-J. Lord Justice James said: "Amongst the common-law maxims was one by which a married woman was held incapable of taking a gift either from her husband or from a stranger, holding that in the one case it remained and in the other case it became the husband's property. But the Court of Chancery invented that blessed word and thing 'the separate use of a married woman;' and as that Court never allowed itself to be impeded or obstructed by mere technicalities, it provided that whenever it was necessary, and so far as it is necessary, to give effect to that separate use of a married woman, the husband should be made a trustee of whatever property came to him in his marital right which ought to be so held. The legal right was not interfered with, but the husband was made a trustee for his wife. There are several cases of that kind in the books. Now in this case, if the married woman (whether with the business that she had before the marriage, or a business which she had established after the marriage with the consent of her husband, is immaterial) was allowed by her husband to carry on that business for her own benefit, separately from and independently of him, which the Act of Parliament allows to be done, making the carrying on separately and distinctly a separate use for her, then the trade itself becomes her separate property, and everything that is incident to and connected with the trade becomes in my opinion part of that separate trade, and the husband is, if and so far as is necessary, a trustee of everything which was devoted to that trade of which he had allowed the wife to be the separate owner." Lord Justice Baggallay said: "If there had been no recognised

principle of equity that a husband can constitute himself a trustee for his wife, and if the case had to depend upon the application of the provisions of the Married Women's Property Act to the general principle that a wife's property vests in her husband on the occasion of her marriage, I should have felt some doubt in holding that the case could be supported under any of the clauses of the Married Women's Property Act, or under any combination of those clauses. But such a principle does exist, and the simple question is whether the evidence is sufficient to show that the husband has so constituted himself a trustee." Lord Coleridge no doubt founded upon the Act of 1870, but his view need not be further adverted to. We do not wonder that the Court of Session held the decision in *Ashworth's* case inapplicable to the question before them. "The occurrence of bankruptcy," said the Lord President, "and the impossibility of a gift by a husband to a wife standing as against the right of creditors to revoke, excludes the notion of the husband being in the position of a trustee for his wife."

FIFTEENTH REPORT ON THE JUDICIAL STATISTICS OF SCOTLAND, BEING FOR THE YEAR 1882.

THIS report bears date 1st August 1883, but from unavoidable hindrances it was not issued until much later. It appears somewhat anomalous that the duty of collecting, tabulating, and publishing these judicial statistics has been devolved by the Act 32 and 33 Vict. c. 33, on the *Prison Commissioners*. Much of the present report is connected with *police*, which we apprehend has more of an *executive* than a *judicial* character, and therefore ought more appropriately to form part of the Report of the Commissioners of Prisons.

The first table in the present report is termed "*Adjustment Table*." This means nothing more nor less than an *errata*, although introduced by a much more grandiloquent name. It was scarcely worth while to record one error of *three* figures. It is apt to cast a doubt on other and more intricate returns, and it is not likely that any morbid statist will ever make the trivial correction now disclosed.

The first portion of the report is filled with a "digest of the returns rendered by Sheriffs of Counties and Magistrates of Burghs" on police establishments. A retrospective table is given, followed by a comparative table (1) of police establishments, (2) the effective state of forces, and (3) the expenses of the establishments, in the years 1880, 1881, and 1882. We venture to think that as the police establishments are placed under the superintendence of a Government officer, on whose report the aid of the Treasury is given to Local Authorities, that these statements and figures would

be more appropriately and economically given by him. Certainly they are altogether foreign to *judicial* statistics. From this table it appears that in the years above mentioned there was a police force—

	1880.	1881.	1882.
In counties, of	1331	1371	1402
In burghs,	2371	2377	2385
Total in both,	3702	3748	3787

The total expense of establishment (fractions of pounds being omitted) was—

	1880.	1881.	1882.
In counties,	£125,134	£125,580	£131,372
In burghs,	191,278	199,560	200,347
In both,	£316,412	£325,140	£331,719

The table proceeds to divide the force thus :—1 chief constables, 2 superintendents, 3 lieutenants, 4 inspectors, 5 serjeants, 6 constables, 7 supernumerary constables. One strange entry is found in this table, "*force authorized*" and "*force not authorized*." While there are few without authority stated to be found in the county force, the number of "*services irregular*" are much increased in the burgh police, amounting in the three years above noted to 153, 166, 153. It would have been well had a note affording some explanation of these unauthorized Dogberries been appended. The table proceeds to detail the expenditure as follows :—(1) Salaries ; (2) allowances and contingent expenses ; (3) clothing and *accoutrements* (it would have been well had the public been informed what fell under the last term, whether mere batons and handcuffs or revolvers) ; (4) superannuations and *gratuities* ; (5) horses, harness, forage, etc. ; (6) station-houses charges ; (7) *all other charges*. This last item is indeed a formidable one, amounting in 1882, between county and burgh, to no less a sum than £15,715 ! The previous items of charges, one would have imagined, contained all *possible* charges. No doubt police committees will examine minutely these charges, but to a stranger they appear somewhat extravagant. The table concludes with sums paid by H.M. Treasury within the year in aid of the police expenditure :—

	1880.	1881.	1882.
There were paid—			
To counties,	£48,425	£49,893	£50,341
To burghs,	81,979	81,990	83,465
To both,	£130,404	£131,883	£133,806

There follows an entry of superannuations, etc., paid out of "Superannuation Funds," without any notice of the source of these funds. Very insignificant, however, must be these funds, for in 1882 only £18, 8s. 9d. was received by counties, though in 1880 burghs drew £92, 7s. 2d.

The second table is what is termed a "retrospective table," or a "comparative table of persons charged and disposed of (?) by the police in Scotland in the five years ended 1882." We are not in favour with the term "*disposed of*." No doubt subsequent statistics explain this *very* ambiguous term, but they prove that it was not the police who thus disposed of the culprits. The police only had the initiatory step of handing the persons over to the *ministers of justice* to be disposed of "according to law."

We extract the most important statistics recorded in the second table. It runs in these terms: "Disposal of persons *charged* by the police." We venture to say that the police make no *direct charge* against *any* person, but offenders are given *in charge* to the police by complainers or accusers. Number apprehended or cited in the following years:—

	1878.	1879.	1880.	1881.	1882.
In counties, . . .	30,195	27,895	29,584	29,324	30,482
In burghs, . . .	108,919	93,968	104,937	106,307	110,034

A column is charitably given for the offenders in counties and burghs *charged by* (or *to*) the police being blended together, a feat which any person desirous to ascertain might with great ease accomplish for himself. It is worthy of remark the almost uniform number of offenders recorded in each successive year both in counties and burghs. This table would have been more complete and satisfactory had the sexes of the offenders been mentioned, and also whether they were cited or apprehended "*oborto collo*." The table proceeds to distinguish the kind of offences thus:—(1) Against the person, (2) against property, and (3) miscellaneous. Offences against *property* far exceed those against the *person* both in counties and burghs, but to much greater extent in the latter. But the "*miscellany*" exceeds both put together. In the last of the series (1882) the number amounting to no less than 19,609 in counties and 93,624 in burghs. It may be doubted whether many cases might have been arranged privately without police interference, which is more likely to aggravate instead of allaying strife, frequently leading to recriminations and counter charges. The Romans had a wise saying, "*De minimis prætor non curat*" ("The judge does not interfere in small matters"). This sentiment introduced into police law might be found productive of great good, and a careful ear and deliberate action might frequently be of more avail than ready and credulous entertainment of charges, and prompt, oftentimes hasty and harsh, action.

The second table proceeds to deal with the result of proceedings thus: "*Tried at the instance of the police*." We doubt whether the police as a body has any power to prosecute; the Fiscal has alone the instance, and which is generally used. Under this category the numbers are much greater in burghs than in counties, and the aggregate in both in 1882 amounted to 120,466, being much the highest in the five years. The next classification of the offenders

is "*Committed for trial.*" The numbers here are much less than those said to be "*Tried at the instance of the police.*" In 1882 the aggregate numbers for both counties and burghs amounted to 4395. The next item is somewhat strange, being the numbers "*neither tried at the instance of the police nor committed for trial.*" In 1882 the numbers both in counties and burghs were, being the highest in the series, 15,655. The next class is the "*Disposal of those tried at the instance of the police.*" This is somewhat satisfactory: of 120,466 persons so tried 111,919 were convicted, whilst 8547 were acquitted. Even this result is somewhat disparaging, as the persons so acquitted must have gained nothing in character in passing the bar of the Police Court. The next classification is as to those *charged* but not tried; the first item of their "*disposal*" is "*proceedings dropped.*" This "*drop scene*" is on the whole enacted about double times in number in burghs than in counties. In the year 1882, whilst 5199 were dropped in counties, no less than 9968 had the same happy deliverance in burghs, giving in both 15,167 who were *charged* with offences but left untried,—no satisfactory result, leaving to be inferred that the police are somewhat eager to push business and to listen to unfounded charges. It is correct to mention that the table shows the numbers "*standing over untried at the end of the years.*" In this class the numbers are much higher in counties than in burghs. In 1882 the numbers in counties were 292, and in burghs 196, whilst in former years these remnants in burghs were only 67, 62, 70, and 128. Under this class there are grounds for inquiry as to how long should a police charge remain against a person in the police books without trial. The next class is somewhat ambiguous. It is headed "*Disposal of charges*" (not persons or offences). This is subdivided thus:—(1st) "Number of offences reported or made known to police;" then subdivided into (1st) "Offences reported," (2nd) "Offences otherwise made known to them and entered in their books." In the year 1882, the highest in the quinquennial series, of 127,093 offences "*reported or made known to the police*" of both counties and burghs, 29,266 are assigned to counties, and no less than 97,827 to burghs,—a fact worthy of consideration. The return sets forth that out of 127,093 offences, 101,591 were reported to the police of counties and burghs, and 25,502 otherwise made known to them and entered in the police books. The "*nature of the offences thus reported or made known to the police of counties and burghs were offences against the person,*" to the number of 9059 in the year 1882; thus allotted—to counties 5238, and to burghs 3821; "*against property,*" 25,364, giving to the counties 7166, and to the burghs 18,198. But the miscellaneous offences far exceed those against person or property; in the year 1882 numbering 92,670, the highest in the series, giving 75,808 to burghs, and only 16,862 to counties. This may be accounted for by police offences being more numerous in civic

communities. The last class in the second table is one deserving of much consideration. It is headed "Analysis of Charges." This obviously includes "Charges reported," and "Otherwise made known to the police." This title is subdivided into—(1) "Offences for which one or more persons were either apprehended or cited;" (2) "Offences for which no one has been apprehended or cited." It thus appears, out of 127,093 offences reported or made known to the police in 1882, in 110,566 one or more persons had been cited or apprehended as offenders, whilst in the case of 16,527 offences no person had been got to answer for the offence. May this not be accounted for in so far as there was really no offence, but the charge rashly made, and sometimes from motives of enmity?

The third table and the fourth assign to the county the police establishments and their general expenses, with the various divisions of the force and the expenditure thereof. We do not perceive the expediency of a column designed for lieutenants, when there appears to have been no one bearing that title attached to any county. There appears to be a great discrepancy between the police force and consequent expenditure in different counties compared with the population which is given in the report; but of course this greatly depends on the kind of population, whether rural or urban, only that the latter has generally a police force for themselves. As might be expected, Lanark has the largest force, 240; but its present strength is reported as only 225. Vacancies are reported at 15, but which does not account for the discrepancy, the more especially as no one appears in the sick column. The total cost of the Lanark police force is stated at £22,037, to which the Treasury contributed £8457. The county of Kinross has the smallest number of police, being a chief and four constables, and the whole cost is £392, whereof the Treasury contributed £170. The table reports only nine constables as being "*not authorized*." Three of these nondescripts are attached to Ayr and two to Banff, three to Roxburgh, and one to Haddington. Only 11 are stated under the head of detectives, the greatest number of which are credited to the county of Perth. Under the column headed "Superannuations and Gratuities paid out of Superannuation Fund," there is only one entry of £18, 8s. 9d., debited to the county of Kincardine, which leads to the inference that this fund must be a local one. This becomes more perplexing when it appears under another column of "Superannuations and Gratuities," amounting to £170, 14s. 9d., of which no less than £50, 10s. is debited to Dumbarton. This £18, 8s. 9d. paid to Kincardine appears with the others again in the same column. One remarkable column is headed, "Horses, Harness, Forage," etc., amounting to £272, 9s. 2d. One would expect this to apply to counties of wide extent, but Ayrshire has £82, 9s. 2d., and Banff and Haddington have each £50 of expenditure under this head, whilst the great majority of counties have no article of expenditure of this description.

The fifth table in the same manner deals with the burgh police forces as the fourth table did with that of counties. The largest is that of Glasgow, being 952 authorized; but every one must regret that it is stated to have no fewer than 86 acting *without authority*. We can gather from certain notes that this number is attached to the harbour, and have no "Government grant." But this certainly does not infer that they are *without* authority, or that they should not enjoy the same aid from the Treasury as is extended to all other branches of the police force. The police force of Glasgow proper, exclusive of Maryhill, Partick, and Govan, costs £90,604, whereof £37,321 has been contributed by the Treasury. The lowest in numbers of police force is that of Pulteneytown, being only three, and the cost £153, and no grant received from the Treasury. It will be observed from minute comparisons, that contrasting the police force and expenditure in different towns as in counties, that the force and consequent cost is not at all in proportion to the populations. The total force in counties is 1402, and the cost £131,372. The total force in burghs 2385, and the cost £200,347. The police forces in both counties and towns is 3787, and the cost £331,710.

Table VII. gives diversified details of the disposal of persons *charged* by the police within the year 1882. This table distributes the persons or cases among the 32 counties. A former table (II.) gives the gross amount of persons charged and disposed of for five years ending in 1882. It would have been better that this table had followed Table II., and not been separated by the various tables as to the amount and cost of the police establishments. Of the 30,103 apprehended or cited within the year in counties, the highest number is assigned to Lanark (including Glasgow), being 6134, of which 1491 were offences against the person, 1179 against property; and the lowest to Cromarty, being 12, of which 4 were offences against the person, and 2 against property. Of 12 offenders who were tried, it appears none were acquitted. There are some curious figures under this head which appear, such as in Kinross, where, whilst 44 persons were tried, only 2 were acquitted. The remarkable fact is that 5199 proceedings taken by the police were "*dropped*" in the year 1882. Cromarty and Kinross alone have the credit of having no procedure thus extinguished without trial. In other counties, the numbers under this ambiguous head are great, and often, when contrasted with the population and number charged, demands explanation. Table VIII. gives the charges reported to the police or made known to them in the year 1882 in the 32 counties, under the branches of offences against person, against property, and 26 offences ranked as miscellaneous. There were 29,266 charges, of which 5238 were offences against the person, 7166 against property, and 16,862 miscellaneous offences. The only remark on this annual table is what was made on the quinquennial table, "that of the 29,266 charges, in no less

than 5726 *no person* was apprehended within the year, whilst 23,540 persons were apprehended. Table IX. gives the same results in the 37 police towns. The table, in addition to the charges taken in the year, gives 128 standing over at the end of the year, which, with *persons* charged within the year, gives a total of 110,034,—of which 4137 were charges against the person, 12,273 against property, and 93,624 for *miscellaneous* offences. Of 110,034 persons, there were 96,479 tried at the “*instance of the police*,” and 3391 “*committed for trial*,” and 10,164 dealt with *in neither way*. Of the 96,479 tried at the instance of the police, 89,642 were convicted, and 6827 were acquitted. It is satisfactory to find that only 196 charges or offences “*stood over at the end of the year*.” The table closes with the combination of the totals of both counties and burghs, and shows no less than 15,167 cases of *dropped* procedure. Of 97,827 charged or made known to the police, 10,801 had no person apprehended or cited, but 87,026 one or more persons were apprehended or cited. This closes the police returns, which we still are of opinion cannot be properly regarded as “*judicial statistics*,” and might with much more propriety have been separately reported on by the inspector of the police force, where they would receive that attention which they deserve, but are likely to be lost amidst the details of the Supreme, the Sheriff, and Justice of Peace Courts, and other minute details included in this volume of 135 folio pages, of which 15 are given to matters of police.

Leaving the statistics of county and burgh police, a table is introduced with a title which we venture to dispute for its accuracy. It is in these terms: “Criminal Offenders (*viz.* persons committed for trial *and bailed*). Digest of Returns rendered by Sheriffs of Counties under the provisions of 11 Geo. IV. and 1 Gul. IV. sec. 15, for the year 31st December 1882.” Of course many of these offenders must have already appeared in the police returns as “*persons committed for trial*.” But the obvious objection to the title is that the table sets forth that all committed for trial *were bailed*. In the first place, many, and indeed the greater proportion, of the offences are not bailable; and it is well known that many offenders who are entitled to be liberated on bail make no application for release. They are detained until their trial. They can force on their trial by a certain mode technically known as “*running their letters*.” It would have been very important to have had the number of those accelerations, which is of easy attainment, but singularly enough no such table is given; while many of greatly less importance, and with much more difficulty in the ascertainment, are given. It is obvious that by far the greater number of offenders contained in the tables under this head were not bailed, and most of them were not bailable.

The first table under this division is a comparative table of criminal offenders in Scotland for the five years ended 1882:—

	1878.	1879.	1880.	1881.	1882.
Committed for trial, with those undisposed of from previous year,	3191	2945	2818	2650	2692
Number called for trial,	2576	2367	2326	2081	2198
Convicted,	2273	2091	2046	1832	1943
Verdict not guilty,	86	79	95	63	66
Verdict not proven,	196	174	160	172	170

(This exclusive of persons outlawed or found unfit for trial because of insanity, or on trial found to be insane.)

The persons tried were, in—

	1878.	1879.	1880.	1881.	1882.
The High Court of Justiciary,	98	105	95	104	98
Circuit Courts,	359	318	263	317	381
Sheriff Courts, with a jury,	1235	1129	1188	1006	1061
Without a jury,	882	805	778	648	654

(This, of course, is exclusive of cases not reported to Crown counsel.)

Sentences :—

	1878.	1879.	1880.	1881.	1882.
To death, afterwards commuted,	4	...	...	1	...
To penal servitude for life, and different periods, all given,	204	182	181	161	177
To imprisonment for different periods, all stated,	2004	1849	1838	1613	1705
Whipping, and discharged on sureties,	23	28	22	15	27
Number not sentenced,	38	32	55	42	34
Below twelve years of age,	17	14	11	7	11
Above sixty,	33	37	37	32	47
Convicted with previous convictions,	850	809	833	769	842
Found to be habit and repute thieves,	17	21	18	14	20
With more than one offence,	77	113	120	74	69

Numbers committed for trial within the year 1882, 2692, of whom for offences against the person there were 795. The general table of offences is distributed amongst the 32 counties. There is one important table showing the number of weeks between the committal for trial and disposal of the prisoner. It is pleasant to learn that of 1943 persons convicted, 348 were tried within *one week* after committal, and by far the greater proportion within seven weeks. But it appears somewhat unfortunate for the despatch of business or gaol delivery, *ten* persons should appear to have been in prison *twenty* weeks after committal before their trial. The table is divided amongst the several counties, and the longest period of detention is 27 weeks, and placed under the county of Argyll; the next longest is 25 weeks, and assigned to Orkney. Doubtless these detentions will admit of easy and satisfactory explanation. There follow several tables giving the ages and sexes of the offenders, and their cause of trial and their aggravations, and these again are divided among the several counties. This department of the statistics closes with a decennial table of criminal offenders disposed of in Scotland for the ten years ended in 1883, and divides the general table amongst the counties.

A table states that in the following years there were criminal offenders disposed of:—

	1873.	1874.	1875.	1876.	1877.
For offences against person,	835	979	918	841	888
Offences against property with violence,	411	480	509	440	448
Offences against property without violence,	1234	1202	1168	1139	1097
Malicious offences against property,	41	37	50	41	37
Forgery and offences against currency,	36	39	29	35	41
Other fifteen offences, besides high crimes and minor offences not included above,	164	181	217	181	169
Grand totals,	2721	2918	2891	2677	2680

	1878.	1879.	1880.	1881.	1882.
For offences against person,	861	765	802	717	748
Offences against property with violence,	686	620	528	509	585
Offences against property without violence,	1076	1081	947	948	955
Malicious offences against property,	61	56	58	51	50
Forgery and offences against currency,	53	61	50	60	46
Other fifteen offences, besides high crimes and minor offences not included above,	209	177	227	142	156
Grand totals,	2946	2710	2612	2427	2540

The second table states the disposal of persons committed for trial among the various counties,—burghs, of course, included. The quinquennial averages are given,—first for the five years ended in 1877, and a second for the next five years ended in 1882, but in justice to the counties, the average ought to have been struck for the whole ten years. We are not surprised that the average fixed on Lanark in the last five years should be 859 offenders, nor in Edinburgh 278 (though the difference is very great), but we are rather astonished at the thinly populated county of Argyll having an average so high as 122. Kinross has only an average of 5, and Cromarty of 4; and in two of the five years forming the quinquennial period there was no offender of the class, and the like vacuity in two years of the preceding five years. Much labour and expense must have been expended in these tables of criminal offenders, and we greatly doubt of any judicial benefits being derived therefrom.

(To be continued.)

THE FUTURE OF THE BAR.

THE Bar has not come as well as as it might have done out of the discussion recently raised in the *Times* and elsewhere. One or two writers have successfully exposed the weakness of the solicitors' case, as put in the article which started the subject, and retorted rather happily on the grievances of the public against solicitors. But, considering the amount of literary ability at the disposal of the Bar, there has been a disappointing absence of comprehensive effort to defend the position of the Bar in our legal system, or to suggest a policy which may shape its

future relations with suitors and solicitors. There is a great deal to be urged (and from more than one point of view) in favour of the maintenance of the present system in its established form. We will say nothing of the fact that the division of labour between Bar and solicitors has grown up spontaneously, and stood the test of many years—almost many centuries—experience. The *a priori* argument in favour of the system is of course always liable to be met by a sufficiently loud outcry against it, and in the present day will have no weight against any plausible evidence of inexpediency. On behalf of the separate existence of the Bar may be urged all the usual arguments in favour of division of labour, the most important of which, from the public point of view, probably is the creation of a class specially learned in questions of abstract law, with special opportunities at command for mastering the legal bearings of each particular case, and specially trained in purely forensic accomplishments. These results tell in favour both of individual clients and the general administration of the law. There may be individual barristers who are worse lawyers than the majority of solicitors. There may be individual solicitors who could make a better speech, state a case better, or handle a witness more skilfully than the average barrister. But, on the whole, there can be no question that when once he comes into Court, a client is likely to be better served by a specially-trained advocate than he would be by one who is engaged for nine-tenths of his working time in the miscellaneous and often only *quasi*-legal business of a solicitor's office. On the other hand, the general administration of justice gains by the more business-like despatch of work in practised hands, and by the purely legal help often given to the judge by experienced counsel. Any one who fails to understand the full weight of this argument need only watch the struggles of a County Court judge to get some everyday dispute out of the mass of perplexity in which unskilful advocacy has entangled it. It is notorious that the County Court judges have commonly to combine the functions of counsel and judge, and very strong argument must be adduced to justify the introduction of such a state of things into the Superior Courts.

More than one conspicuous advantage of the present system arises out of the separation of counsel and client in the earlier stages of a dispute. The effect of this arrangement is to raise counsel above the personal animosity and distorted view of facts which not unfrequently warp the judgment of solicitors equally with that of the parties more immediately interested. Counsel are thus placed in a *quasi*-judicial position, which often enables them to stay a dispute before it proceeds to extremities; and when it comes to actual fighting, are left free from that rancorous partisanship which is so fatal to effective advocacy before an impartial tribunal. This is the answer to the extravagant charge recently raised in the *Times*, that the present system renders the

profession of a barrister "immoral." A paid advocate, whether he be barrister, politician, or journalist, is necessarily open to the reproach of fighting for the success of his side, and not in the cause of truth and justice. The writer who used this argument has given no evidence beyond his own opinion to show why this reproach would be less justified were the advocate called a solicitor instead of a barrister. It is at least certain that for every barrister found under the present system advocating an unjust cause, there must be an instructing solicitor in the background; and if, as this writer states, personal contact with their clients has raised solicitors to a higher moral level than the other branch of the profession, he ought at least to have explained where the briefs to counsel in the immoral causes come from. A solicitor must be perversely blind to those examples of professional misconduct which too frequently call for the notice of the Incorporated Law Society, when he has the temerity to argue that the tone and morality of advocacy will be raised by admitting solicitors of every degree to the privilege of counsel. So far from the separation of counsel and client leading to immoral or unduly protracted litigation, the independent position thus secured to the Bar often gives the opportunity for counteracting the pugnacity of solicitors by a timely check at the commencement of a dispute, or a suggestion of compromise at the end of it. At the same time, it serves as an invaluable safeguard against irresponsible litigation by the less reputable members of the lower branch of the profession.

There are other and weighty arguments for the maintenance of the Bar in something approaching to its present character and position, but we prefer to dwell on those aspects of the question in which the direct interest of litigants is most conspicuous. What is to be said on the other side? Except for the frivolous argument just dealt with, the whole case turns on the question of costs. There was an obvious fallacy on this point running through the late article in the *Times* which has probably struck many readers. It appeared to be tacitly assumed by the writer that, if only solicitors were allowed to do the work of counsel, counsel's fees would be saved. Would then the solicitor-advocate render his services gratuitously? The answer may be left to any one who has had the privilege of paying a solicitor's bill. There is not the slightest warrant for supposing that any solicitor of standing would take a case into Court for a smaller fee than would at present obtain the services of an equally competent barrister. On the contrary, there is good reason to believe that it would not pay members of first-class firms to undertake the work of barristers on the present scale of the fees of the junior Bar. It is certain that at the present moment a very large number of solicitors find it worth while to employ the junior Bar in County Court work, not from any faith in the virtues of a wig and gown, but from simple

motives of personal convenience. What is already true of the more important class of County Court work would be still more generally true of cases requiring greater care in preparation and longer time for their despatch. Hence, if solicitors are allowed an audience in the Superior Courts, a tendency must inevitably assert itself, as pointed out by Mr. Aston, towards the growth of a class of solicitor-advocates who will themselves accept briefs from their brother solicitors,—a tendency already seen in County Court practice. No impartial observer will expect any gain to the outside public from such a change as this. It is a mere substitution of Tweedledum for Tweedledee. The truth is, that if counsel's fees in many cases swell costs unduly, it is no necessary consequence of the present system. In the total costs of an average action, whether on the Queen's Bench or Chancery side, the fees of counsel usually bear a very small proportion to those of solicitors, even when regard is had to the amount and character of the work done. Where excessive fees are at present paid to counsel, it is, as one able contributor to the discussion has pointed out, purely at the option of the client, and because he chooses to engage the services of an individual "who commands a fancy price." So long as advocacy exists, there must be leaders of the profession in this position. It will make no difference whether the particular individual is called a barrister or solicitor. He is the creation of competition among litigants, and no mere re-adjustment of the functions of the profession can, so to speak, affect his market value.

Is then the present the best possible system? We are far from saying it. What we desire is, to point out to the Bar that the suggestion with which the discussion started is a suggestion of very doubtful expediency in the public interest. It is pretty clear that the bulk of the cost of litigation is at present compiled not in counsel's chambers, but in solicitors' offices. On what principle, then, can it be argued that the client will benefit by transferring the present work of the barrister to the solicitor, and giving the latter absolute control over his client's interest? The legitimate inference is in favour of an extension of the province of the Bar in litigation at the expense of the solicitors. We do not propose amalgamation. There are, as we have attempted to indicate, valid and convincing arguments on grounds of pure expediency for the retention of the Bar as an independent order. But we have great faith in the practical advantage to be expected by the public from an increase of the share of the Bar in the mere business of litigation. When the recent heap of criticisms and suggestions is winnowed down, the single grain of truth in this matter of the cost entailed by the present position of the Bar, will probably be found in the letter of the "Anglo-American" lawyer, who made the most sweeping attack on the established order of things; and this grain of truth is—the expense involved in the preparation of

the brief to counsel. "The suitor pays a very heavy bill, but the greater part represents the merely mechanical and routine labour of the solicitor's clerks in correspondence, copies, fair copies, close copies, etc., *ad nauseam*. The prolix narratives that in England stuff a bulky brief are represented in America by a few notes on a sheet of foolscap. *Cases would be better conducted, and counsel more adequately remunerated, if they could see the client and his witnesses, make their own notes, and add the cost of the brief as now prepared to their fees.*" This is the conclusion to which the whole course of the controversy has tended; and in our opinion full effect can only be given to it by placing the client and the whole conduct of the case in the hands of persons who are in the position of counsel from the time of the issue of the writ. At any rate, let it be generally understood by barristers that there is a great weight of argument in the direction thus indicated. For the first time in its history the Bar has an organization capable of initiating a movement in the direction to which all the circumstances of the day point. Why should there be any hesitation about moving?—*Law Times*.

THE PROPOSED DISTRICT COURTS.

BY A BARRISTER.

THE statement which appeared in the newspapers a few days ago, that a Bill had been drafted by the Lord Chancellor for the formation of some dozen or more District Courts of the High Court of Justice, created considerable consternation in legal circles, but not more than the very startling provisions of such Bill seemed to warrant.

That statement is now contradicted, and the Bill is said to be merely the handiwork of private members; but it may not be out of place to discuss certain of the provisions contained in it.

The District Courts, which for the most part are to be in the north and centre of England, the realms of the Northern, North-Eastern, and Midland Circuits, are to have all or most of the powers of the High Court in all civil cases; to be presided over by a judge selected from the existing County Court judges or from barristers of ten years' standing, with a salary of £3000 a year, and a registrar with a salary of £1500. They are apparently intended to absorb the County Courts in the districts where they are located, and solicitors are to have the privilege of addressing the Court. These are the main provisions of this rumoured Bill.

It is difficult at first, for minds trained and nursed in the old forms and traditions of the law, to brace themselves to the calm contemplation of what such a change really means. The barrister sees in the provision allowing solicitors to address the Court, another bolt shot at the time-honoured and world-renowned profession of which he is a member. Before the eyes of the young

solicitor float visions of boundless practice in some pleasant rural centre, uniting all the charms of successful advocacy with the probable emancipation of his class from the law of negligence, with all the honours of the Bench and the Woolsack a little more distant; while the older member of that branch of the profession, grown grey in the more domestic sphere of law, hitherto peculiarly his own, talks gravely, if not sourly, of amalgamation, and the timidity of clients at every change.

In the first place, there can be little doubt that such a Bill would take away a certain amount of business from London, but would probably, if the measure were fairly worked, produce a certain increase of business in those districts in which the new Courts are situated. It has been truly said that facility and cheapness are the foster parents of litigation; and it may fairly be doubted whether such a measure would not produce more litigation throughout the country on the whole; while the amount of business in London would probably not decrease in proportion to the number of lawyers left there, whose practice is mainly derived from town and the districts immediately round it, for the measure would certainly lead to the localization of many barristers and solicitors. It is probable, too, that many litigants would like to have important questions decided by the highest judges of the land, and would prefer their decision to that of the nearer but less reputed provincial judge.

The provision of the Bill which has brought down upon itself the severest criticism is that which gives solicitors the privilege of acting as advocates in these Courts. It is said, and with considerable reason, that if they practise in district Courts of the High Court of Justice, there will remain no logical objection to their doing so in the High Court in London itself. It may be thought extremely doubtful whether the higher class of solicitors to whom important cases are entrusted would care to avail themselves of such privilege, certainly while they are still amenable to the law of negligence. A solicitor who puts his case into the hands of a barrister is free from such charge, and all honour is due to the Bar of England that hitherto such doctrine has not been questioned. Still it is probable that a very large number of solicitors would avail themselves of this right, and to a considerable extent oust the Bar from their exclusive right of advocacy, if such provision were allowed to stand as part of the Bill—a circumstance that is extremely unlikely, even were the Bill to pass as a whole.

Supposing, however, that the Bill were to pass, and such provision to remain part of it, the Bar would no doubt retaliate, and such of them as remained would claim to see clients in person, and there could be no gainsaying their right to do so. The inevitable result of such practices would be the amalgamation of the two branches of the profession.

Now, although the old idea of the division of labour, namely, that a man could do that which he had been trained to do, and is in the

habit of doing, better than things he had never tried, and one particular business better than many kinds of business, is now so universally broken through in every branch of trade, that it has well-nigh become obsolete; but it may still be doubted whether it would not be for the best interests of the public that the functions of advocate and attorney should still be kept separate. A man who has had the drudgery of working up the details of the papers and evidence in any case is apt to take a less clear and broad view of the facts, to be more led away and biassed by small circumstances, than one who has seen the whole matter elucidated and placed clearly before him, as the barrister now has. It is probable, too, that a man who is acting as advocate every day will be a better advocate than one who is writing letters three days out of four, and acting as advocate only on the fourth.

Should such amalgamation of the two branches of the profession ever take place, it is more than probable that the same class of men would not go into the law as a profession that now go to the Bar; and it certainly is in the interests of the public that, in legal matters, they should be served by men of the very highest class and education. It must also be remembered that, if you lower the class of men from whom the judges are taken, you would lower the judges—a still more important consideration for the public.

The chief points in favour of such a scheme are no doubt that it would make law easier and presumably cheaper. The expense and delays of the law are too trite a subject of abuse to comment on here. No doubt a certain amount of litigation is unavoidable, and it is desirable to have law speedy and cheap for such matters; but by having it so, a host of frivolous and foolish litigants would be bred, engaged in equally foolish disputes. To judge by the many frivolous cases that come into the Courts at present, encouragement to such litigation would be anything but an unmixed good.

Such a Bill, if passed in anything like its reported shape, would no doubt produce immense changes. The Chancery Bar it would touch the least, and London agency firms the most. That such a Bill will be passed immediately, or even within a few years, is extremely doubtful; but there can be little doubt that certain changes in this direction are the subject of pretty general contemplation, and it behoves the profession and the public to rally their minds to consider what would be for the best interests of the greatest number in these matters.

Correspondence.

(To the Editor of the Journal of Jurisprudence.)

THE COST OF A SUCCESSFUL LITIGATION.

SIR,—It is beyond question that the injustice exists which is described in the interesting article on this subject in your January

number; and this is the case not merely as to the expense of unsuccessful pleas appearing in the process, but as to all expenses, even extrajudicial, which a prudent agent would incur; and a remedy, to be satisfactory, should provide for all such expenses. The cause of no remedy having yet been provided seems to be not any reasonable doubt as to the existence of this injustice, but merely the difficulty, hitherto apparently deemed insuperable and unavoidable, of providing a remedy which, besides being effectual and easily practicable, would be free from disadvantages at least equivalent to the advantages gained—a very common barrier in the way of giving full scope in practice to equitable principles.

According to the present practice, the Court and Auditor, in taxing such accounts as are chargeable by an agent against his client, rely to a considerable extent on the presumption that the client has chosen an agent who, at least in dealing with him, will act honestly, and will be influenced at least by that narrow sense of duty which even those agents who have least moral principle can hardly avoid feeling towards their own clients, and rely still more on the necessity imposed even on such agents for the preservation of their business, of avoiding the suspicion of concocting unnecessary expenses against their clients. The presumptions arising from these considerations enable the Court and Auditor, and the client himself, with a fair degree of safety to the latter, to assume many things without proof. If these considerations were eliminated, as would be the case were accounts of this description chargeable against an opponent, the present process of taxation, to be effectual, would require to be expanded into an intricate, expensive, and uncertain investigation, similar to an independent litigation. Apart from the uncertainty of the result, it would be a doubtful boon to the successful litigant, just relieved of his anxieties, to invite him to a new litigation. The difficulty of supervising the agent's proceedings so as to detect unnecessary expenditure, might tempt some agents to concoct such expenses, not merely because that would increase their gains without troubling them with such feelings of compunction as they would feel in overcharging their own clients, but even as a means of depriving their opponent of the sinews of war in some other litigation which might be pending, or which they might be concocting, or even to gratify worse propensities. It has always been the policy of the Court to deal with expenses chargeable against an opponent in a summary way, on general principles, without importing evidence not already in process, and avoiding anything else tending to make the question of expenses a serious renewal of the litigation. A remedy for the existing injustice, according to the plan suggested in your article, to be, or to approximate to, a complete remedy, extending to necessary extrajudicial expenses, would involve a reversal of this policy. I am afraid the disadvantages of such a change would counterbalance its advantages.

Seeing, however, that the existence of the injustice is unquestionable, and that consequently an additional allowance is justly due to the successful party, the only question being how its amount can be satisfactorily ascertained in practice, it seems clear that the Court or the Legislature should not shirk altogether such an important duty as providing some kind of remedy for such an injustice merely because of the difficulty of dealing with it. If a complete remedy cannot at present be devised, then a partial remedy would be better than none. It is generally safest to follow proved rules as far as possible in making changes, and rather than attempt to alter the policy of the Court already referred to, at least as a first step towards remedying this injustice, would it not be advisable to try first the effect in practice of a remedy proceeding on the same lines? Let me suggest for consideration whether this might not be done on the principle of making an allowance to the successful party for what are at present called extrajudicial expenses, to be calculated by a percentage of the judicial expenses, to be fixed by the Auditor or Court according to the nature of the process, without importing evidence not already in process, but guided by general rules to be laid down from statistics procured from the practice of agents of undoubted respectability. This would be following the present policy of the Court in avoiding altogether, rather than meeting and attempting to overcome in practice, the difficulty of taxation already referred to; while it would, on the other hand, free our Courts of Justice from the reproach, so galling to litigants with just causes, of providing no remedy at all for an undoubted injustice. Modern experience of the extensive applicability of the rules of average, insurance, and estimate, prove that no formidable difficulty need be expected in establishing rules fairly accurate; nor are respectable agents with large and varied experience so scarce that reliable statistics would be difficult to procure. Whatever opinions may be formed as to the degree of accuracy with which such rules could be framed and practised so as to meet the demands of justice in all cases, this much seems unquestionable, that an additional allowance to the successful party of a *percentage of judicial expenses so small as to err rather on the small side*, would approach nearer to complete justice than the present practice. If this proposition be correct, its corollary is, that such a remedy for the existing injustice should be provided if no better can be devised. It would be some satisfaction to a litigant injured by his opponent's unfair treatment, to know that the Court at least made some attempt to alleviate this injustice.

Besides the direct inequitable results of the present state of matters in cases actually litigated, it encourages the practice of forcing unfair compromises through the fear imposed on the party wronged of those expenses which are irrecoverable even by the successful party. This indirect result of the practice complained

of ought not to escape notice, or to be denied due weight, although neither judges nor counsel can observe its immoral effects in practice so closely as law agents, who see the seeds of litigation sown, and the unfair results of disputes settled upon threats of litigation.

There is another department of the same general question—reimbursement of costs wrongously caused—which is not dealt with in your article, namely, securing payment of costs awarded. Your article deals only with the department of that general question ending with the procuring of decret; but that, of course, does not effect a just result, unless the decret be paid. As I think it is the defender who at present gets the least share of such assistance as the Court could be asked to give in securing this result, I will confine my remarks mostly to the defender's position. The pursuer appears to have little cause to complain, when we consider what facilities he is usually allowed of doing diligence for his expenses during the dependence of his claim, as well as for the other conclusions; and how he can choose the time most opportune for himself and his circumstances for carrying on the action; and that he need not raise it at all unless satisfied of the defender's solvency; and can control the procedure in the action to suit his views and circumstances in ways not open to the defender. This seems strange, seeing it is the pursuer who seeks to disturb the settled state of things, and who rather, according to a trite maxim, should, until his claim is substantiated, be presumed to be in the wrong, and therefore presumably liable to the defender in expenses. How is it that the defender cannot get a warrant on the dependence to arrest for his expenses, as readily at least as the pursuer? There is nothing which, I think, surprises an outsider, taking a first view of judicial procedure, more than the uncontrolled way in which any one may involve an adversary in a chaos of litigation, with all its anxiety, trouble, and expense, upon mere averments, without showing probable cause, and without even providing security for costs, although that would be but a meagre consolation, seeing costs awarded are no indemnity for all this annoyance, but are merely repayment of outlay, and, as already shown, only a partial repayment even of that. What an utter neglect of the defender's interests, and of his own feelings and those of his family and others who are dependent upon him for their support, is here shown, compared with what is accorded to pursuers claiming damages for injured feelings on the most frivolous pretexts! This great licence seems to have been originally based on the right of every one to demand justice, and to have arisen in every country in a primitive age, when law and procedure, such as existed, were simple, and capable of being conducted efficiently by the parties without agents, and when expenses either did not exist at all, or not to any formidable extent. This state of matters is entirely changed. The process, which at first could be viewed in no other light than

as a demand for justice, now causes the defender so much expense that it may be itself an infliction of injustice on him, not merely from the money value of the expenses, but from their hampering his defence, if his means are limited, against which injustice he is at least as much entitled to protection during the dependence of the action as the pursuer would be against what he complains of if it were substantiated. Further, till quite recently various circumstances have existed which, though perhaps not designed as safeguards against the injustice complained of, yet all combined in practice to operate as such. For instance, the former exclusive nature of the qualifications required of agents practising before the Supreme Court till lately kept the conduct of business in that Court—the one in which expenses are really formidable, and where they are an important factor in determining the efficiency of the defence—in the hands of a limited body of men whom experience proved, from whatever cause, to be as a whole indisposed to encourage unfair litigation. I fear that as to this there has been a change for the worse since the Act of 1873 was passed. I am not committing myself to a wholesale condemnation of that Act, but am merely here pointing out an indirect injurious result which requires to be dealt with. The fear of imprisonment for debt has also been removed—a course, I think, only justifiable, if at all, in the case of business accounts (being those apparently which the promoters of the change had mainly in view) and other debts allowed to be incurred by the creditor voluntarily, and the risk attending which he has consequently voluntarily accepted; and not at all justifiable, indeed, as inequitable and impolitic as can be conceived, in the case of debts arising from the debtor's faults, at least where these faults have been not momentary but deliberate, in which class must be included expenses of unfounded, or, as they may be called at the outset, at best "speculative" litigations, where the pursuer has gone into Court without first seeing that he had, and setting aside, funds for the contingency he must have had clearly in view, of his having to reimburse the defender for money which he was taking out of the pocket of the latter against his will. The danger of non-recovery even of such meagre costs as are at present awarded, unites with the fear already referred to of loss, in any event, of extrajudicial expenses, to form a weapon for forcing unfair compromises from peaceable and frugal persons. The joint effect of all these changes, arising partly from the silent and little noticed march of events, and partly from legislation, some of it somewhat hasty and conducted piecemeal by amateurs, without such deliberation as would have ensured a broad view being obtained of all its aspects and effects, so that these might have been fully provided for, has been to place the defender almost entirely at the mercy of any penniless pursuer with an unfounded claim, who can get some needy speculative agent to take up his case, receiving for his remuneration whatever money the pursuer can raise, which he will

take care to lay hold of before the defender can touch it, or perhaps relying on the probability of forcing an unfair compromise, or even of breaking down the defence, if likely to be expensive, by overwhelming the defender with expenses. It is difficult for a defender without much means to get credit for the cost of his defence, however good his case may be, seeing one part of the expense is certainly, and the remainder possibly, irrecoverable. The state of matters is now so bad, that either the defender must get back his former safeguards, or a sufficient new one must be provided in their place, otherwise the Courts of Justice may be used as instruments of oppression. The remedy I would propose would be to require the pursuer to find good caution or security for expenses in all cases. The present discretionary power of the Court to order caution has not been found workable in practice so as to prevent the injustice complained of. I think one of the principles upon which the promoters of the abolition of imprisonment for debt proceeded was, that it is impolitic, alike in the interests of debtor and creditor, and of the public, to encourage the giving of credit to a debtor who cannot point to some specific assets already acquired by him, out of which payment may be got, and that the incurring of a debt ought to be approximated more to the assigning of an interest in a specific fund already acquired, and less to the entry into voluntary servitude, which it virtually was, when a person could effectually bind himself under the sanction of imprisonment to pay what he had not got. In the case of debts incurred with the creditor's consent, which seem to have been those with which the promoters of the change were most conversant, the creditor had it in his own power, and to some extent might find it practicable, to curtail credit in this way, and it is to his own loss if he does not. But where it is the debtor who has power to inflict the debt upon the creditor, he has no interest to limit credit in this way, in the interest either of the creditor or any one else. Where the creditor is an opposite litigant, the temptation may in some cases be in the opposite direction. It would therefore be only fairly and logically carrying out this principle of the promoters of abolition of imprisonment for debt, in this class of cases, which seems hitherto to have been overlooked by them, to require the pursuer, who as debtor inflicts himself on the defender as creditor, to do for the creditor what the latter would, if he could, be expected to do for himself, namely, to set aside a fund for the debt, by finding caution or security, or else not to incur it at all. This requirement would cause no unreasonable impediment in the pursuit of claims of any reasonable degree of probability, because few honest pursuers, with *bona fide* claims at all probable, even if without funds to provide security, would find difficulty in procuring friends as cautioners; and failing that, the risk, like any other, might even be accepted by a stranger for a consideration or for a share in the result,—a course which, for the purpose in view, would be quite unobjection-

able ; or the pursuer might sell his claim to some person sufficiently honest or solvent to find either caution or security. If the pursuer be neither so honest as to have such a friend, which any honest man can hardly be without, and if his claim be not so probable as to be marketable in any of these modes, where, I demand, can any argument be found justifying his *compelling the defender, his enemy, to accept any risk upon the chance of such an improbable claim proving good, which no one, not even the pursuer's friends, will accept for love or money?* "What is the use of creditors but to give credit?" said a debtor once, when asked for payment. This, assuredly, looks like the principle upon which the science of law in its modern development seems to deal with creditors in questions of this kind with debtors who are their enemies ; and wonderfully useful it has made creditors, to have made one who is an enemy so much more useful than a friend. This modern development of the science of law has assuredly outstripped other sciences which we used to think so progressive. It has enabled so much use to be made of such unpromising subjects as one's enemy and his money seem to be, as throw the achievements of chemistry with coal tar and residual products entirely in the shade. In connection with a recent Parliamentary question, much amusement was caused by a sarcastic motion for leave to bring in a Bill to make loans of money transferable by the debtor to new debtors, and to establish fixity of tenure of loans. The absurdly inequitable nature of the proposal, of course, struck every one ; but what can be said in favour of a practice which has not merely the same inequitable character,—allowing the debtor to be chosen without the creditor's consent,—but which allows the debtor so unrestrainedly to create the debt, and which now has reduced that debt to a thing so unreliable and illusory as it has become, in the class of cases referred to, since the abolition of the power of imprisonment. It is frightful to think what ruin may be brought upon the most industrious and peaceful families by their present exposure to frivolous actions by penniless pursuers. The savings of years may be dissipated by a few days' expenses. There is no class of persons or interests which it is the duty of the Courts and Legislature to protect more than those I refer to. They are generally far more worthy of protection than the class who may seek assistance from the poor's roll ; for the honest and industrious are seldom absolutely poor. All the old lines of defence, such as they were, have been one by one removed ; and now that the law makes so much interference, even with freedom of contract, with the view of attaining equity, surely something will be done to provide safeguards to supply the place of those removed. Nor must we lose sight of the disastrous results, to rich and poor alike, which will arise if capitalists be deterred by the want of protection from such risks from investing money in this country. The fluctuations of the share market show how sensitive capitalists are to any risk affecting trade ; and

if the calculations of private individuals and firms could be made as apparent as in cases where prices of shares are quoted, especially in times of great competition and small margins of profit, we would probably find the value of such risks estimated in some departments at more, and having a greater effect in preventing development of trade in this country, than we expect with our present means of knowledge. Although the disastrous results to capitalists may perhaps not be felt so keenly at the time as when persons of limited means are affected, the effects are more widespread and more insidious. In regard to employers of labour there has also been an increase of risks by recent legislation, and that is still another reason for affording the protection now advocated. In these days of trades' unions, no honest employee with a probable claim need fear being without a friend to caution him.

I think I have shown that the requirement of caution or security from the pursuer would cause no undue impediment to the pursuit of probable claims by honest persons,—at least nothing equivalent to the dangers which have now accumulated against the defender. I may add that caution need not be required before the instituting of the action, but only on the requisition of the defender before any expensive procedure be permitted; and, if thought equitable, the defender might be deprived of the right to plead prescription or *mora*, while procedure is stopped through caution required by him not being found. Although all classes of the legal profession, even the most respectable, may have some little pecuniary interest in the low class of litigations which would be interfered with,—for a litigation with a wrong side must also have a right side, employing respectable counsel and agents,—I rely upon the bulk of the profession having sufficient public spirit to view favourably a change of the law or practice having in view the protection of such important interests as what is now proposed. When we consider how the most prosperous empires have been gradually sapped by evil practices, who shall say how far our own prosperity and civilization may not be undermined by practices so unjust and so disastrous as are now complained of? And what public-spirited body of men will not favour and aid in devising and procuring a remedy?

SIMPLEX.

Reviews.

The Scottish Review. No. V. Alexander Gardner: Paisley and London.

WE have received the fifth number of this excellent quarterly, which is a worthy exponent of the higher thought of the country. There is nothing which appeals specially to us as lawyers in this number, but all members of the learned professions will read with

interest the article on the relation of Scottish Universities to those of England and Germany. We do not pretend to be able to express an opinion on the philological accuracy of the paper dealing with the Irish language. As Scotsmen are nothing if not theological, there are three articles devoted to quasi-religious matters. One is a capital and critical review of M. Renan's *Souvenirs*, another treats of Martin Luther, and the third deals with the Theology of St. Paul. The last is able and erudite, and is not open to the reproach so often cast on Scottish theology—of being narrow and exclusive. A paper on Charles Dickens is discriminately appreciative, but not wholly laudatory of that author; it is, however, one of the best criticisms we have seen for some time. A semi-political article on "What is the Conservative Policy?" concludes the number. We are sure that this journal, as it is at present conducted, will meet the approval of all liberal-minded and thoughtful Scotsmen both at home and abroad.

Jural Relations; or, the Roman Law of Persons as subjects of Jural Relations: being a Translation of the Second Book of Savigny's System of Modern Roman Law. By W. H. RATTIGAN, Fellow of the University of the Punjab, and of Lincoln's Inn, Barrister-at-Law, etc. etc. London: Wildy & Sons. 1884.

THIS translation has been carelessly christened. It has a misleading title; for it is neither a treatise on Jural Relations nor a translation of the Second Book of Savigny's *System of Modern Roman Law*. It is a translation of the second chapter of that book; and although Book II. of the *System* deals exhaustively with Jural Relations, yet the second chapter is of all its subdivisions that one which deals least with the main subject. The second chapter is, in short, episodical, or rather preliminary; for it is devoted to the history and exposition of a conception which, while it can in no sense be called a jural relation, is nevertheless found to underlie all jural relations, viz. the legal conception of the person. The second title of the work before us, "The Roman Law of Persons as subjects of Jural Relations," defines more correctly the scope and matter of the treatise; but on turning to the body of the work after perusing the comprehensive title-page, one feels something of the disappointment experienced by a customer in the premises of the enterprising tradesman who puts all his goods into the shop window.

In his preface the translator expresses surprise that no complete translation into English of Savigny's *System* has appeared during the half-century which has elapsed since the publication of the original. To us, however, the fact does not seem to be due to other than natural causes. The death of the Prussian *Grosskanzler*

left his greatest work a fragment ; and though it has been recognised, incomplete as it is, as a most important contribution both to the study of the Civil Law and to the scientific development of jurisprudence, no second edition has as yet appeared in Germany. It is to be remembered, too, that the authoritative works in English which go over the ground covered by Savigny do not ignore the results at which he arrived. Then, again, the System may not improperly be said to possess too recondite an interest to attract the attention of such students as have not acquired power to read it in the original. For, as a whole, the work has a speculative and historical rather than a practical value. The practising lawyer will care little to learn that the rule of law, for the application of which he contends, has been organically developed from a precept of the XII Tables or a maxim of Modestine. The student of scientific jurisprudence ought certainly to know German.

But if, on the other hand, a translation is offered to English readers, these have a right to expect that the translation shall be into tolerably good English. Without doubt it is not an easy task to "do into English" a technical work on a technical subject, a work in which the terminology and nomenclature are fixed upon principles foreign to the spirit of our language ; but that such a task is not impossible has been demonstrated by Mr. Guthrie in his translation of Savigny's Third Book—a work which, were it not that it possesses a unity of its own and a direct practical value, would go far to minimize the effect of our remarks about the lack of a complete translation. We would accept a less excellent translation than Mr. Guthrie's, if only it were executed with care and clearness ; but almost every page of the translation before us gives evidence of a negligence on the part of the translator which may be said to amount to literary *culpa*, and which renders it impossible for us to recommend the book.

Savigny's treatise is the result of years of continuous thought, and is written in lucid and profound German. Mr. Rattigan's translation is the work of his *moments perdus*, and is written in turbid, inelegant, and slipshod English. Instead of treating his German as if it were English, this translator has treated his English as if it were German. He tries to translate literally ; but inflections drop off in the passage to an uninflected language, and the sentence which was clear and articulate in German becomes painfully complex and diffuse in English. Then, where the composite character of German words calls for their disintegration before they can be adequately rendered into English, Mr. Rattigan assumes that English words can be compounded by mere juxtaposition. Examples of this error meet us on every page. Thus, for instance, the word *Schuldenfähigkeit* is rendered by "Debt-liability." The German word, however, does not denote liability for debt, but capacity to incur debt. Then the word *Klagfähigkeit*, which means capacity to raise an action, is translated by "action-

able capacity." It would be rather hard on pursuers if the capacity to raise an action were an actionable capacity.

Even if we leave out of sight its inadequacy as a reproduction of the original, this translation exhibits so many careless slips and trivial faults of style as to warrant the conclusion that it was done in a hurry and never revised. The translator speaks of "the Justinian Law," as if the Law which he means had been compiled by Justin and not by Justinian. He exhibits a strange inconsistency in the use of the hyphen. Such phrases as "Private Law," "Law Rules," "Jural Capacity" are printed sometimes with a hyphen, sometimes without. In one passage, what on reference to the German text we conclude must have been meant for a hyphen, has been printed as a dash, so as to render a long sentence considerably more unintelligible than it would otherwise have been. The not very dignified particle "anyhow" is printed sometimes as one word, sometimes as two words; we have the possessive pronoun "hers" spelt with an apostrophe; a new and original orthography of the word "vacillates," and many other similar objectionablenesses—to use a word of our translator's—which are here omitted *brevitatis causa*.

Acting apparently on the maxim, *superflua non nocent*, the translator has scattered throughout these pages five very short notes. But this case is one for the application of Quintilian's maxim, *Obstat quicquid non adjuvat*.

Yet with all its faults the book may serve some useful purpose. It may be referred to with advantage by those examiners in rhetoric whose duty it is to draw up examination-papers containing examples of incorrect and clumsy English; and it may act as a new stimulus to the study of German.

Summary of the Law of Intestate Succession in Scotland, with a Brief Outline of the Law of Intestate Succession in England, etc. By P. H. CAMERON, S.S.C. Second Edition, Revised and Enlarged. Edinburgh: Bell & Bradfute. London: William Maxwell & Son. 1884.

If any one, apart from those whose business it is, has a mind so peculiarly constituted as to enjoy the study of a branch of law which is cut and dry and ready for codification, he could not do better than get Mr. Cameron's book. He will then find that the law of intestate succession, which probably appears to many a very simple subject, is not by any means too diffusely treated in a volume of 504 pages. In issuing a second edition of his book, Mr. Cameron has taken the opportunity of making so many additions and alterations that it may fairly be regarded as a new work. He now gives a full survey of the early history of the Law of Intestate Succession in Scotland and the dicta of the Institutional

writers on the subject, thereby enhancing the value of the book to the student very much; and he has added a comparative view of the English law on the subject in such a manner that the differences between the laws of the two countries can be seen at a glance. The latter result is obtained by means of a table in which the various cases of survivance and the rules of succession in the two countries applicable to each are given in parallel columns. Mr. Cameron has also added to this edition a useful epitome of the rules affecting the imposition, collection, and settlement of legacy and succession duties. The book is annotated throughout in a clear and very full manner. The statutes bearing on the subject, from 1617, c. 14, are given at the end with copious annotations, and an ample index completes a book which will be useful both to the student and the practising lawyer.

The Medico-Legal Journal. (Published under the auspices of the Medico-Legal Society of New York.) December 1883.

THE December number of this magazine is devoted exclusively to the psychological department of medico-legal science; in so far, indeed, as one can judge, the Society considers that this subject all but exhausts the sphere of their science. The magazine is one of high excellence. It contains articles on the most important of the legal aspects of insanity, such as the questions of the mechanical restraint of the insane, of expert testimony, of the trial of the insane by jury, of moral insanity, etc. Among the reviews of journals and books, we have an appreciative notice of Maudsley's latest work (*Body and Will*), and a long extract from the last annual report of our Scottish Commissioners in Lunacy. There is a useful summary of recent legal decisions affecting insanity, a list of persons discharged from asylums on *habeas corpus*, reports of transactions of kindred societies, obituary notices, etc. Altogether this magazine cannot fail to prove of great service and of much interest to all who are in any way concerned with the subject of which it treats.

Married Women's Property (Scotland) Act, 1881, with Notes. By J. B. L. BIRNIE, Advocate. Edinburgh: Bell & Bradfute. 1883.

As a circumstance showing the incorrectness of the notion so largely prevalent, that Mr. Irving, the eminent tragedian, entirely discards the traditions and conventionalities of the stage, it has been asserted that he adheres to the custom of actors in their make-up, even to the extent of wearing false calves. We were disposed to scout the possibility of such a thing, but a perusal of the work before us has induced us to admit that

although appearances are against it, the story *may* be true. This is an exceedingly thin book, yet it is very much padded. The 8th section of the Act, which is the subject of commentary, says: "This Act shall not affect any contracts made or to be made between married persons before or during marriage, or the law relating to such contracts, or the law relating to donations between married persons, or to a wife's non-liability to diligence against her person," etc.; whereupon the author proceeds to give a series of notes about "utility of marriage contracts;" "form of marriage contracts;" "ante-nuptial contracts;" "post-nuptial contracts;" "English law as to marriage contracts;" "donations;" "personal diligence,"—in short, upon all the subjects which the Act says it does not affect.

There would be a reason for, and some value in a note which should point out how the Act might have been supposed to trench upon the existing law on these subjects, and hence the necessity for the statute so guarding itself, and pointing out what doubts and questions raised by the enacting sections of the statute this clause has set at rest. This would be elucidation; but the notes we have are padding, and padding of the most deliberate kind. If notes illustrative of the law upon subjects which the Act does not affect, and says it does not affect, are not padding, we are at a loss to know what is. Take again the notes to section 5, which provides that "where a wife is deserted by her husband, or is living apart from him with his consent," the Court "may dispense with the husband's consent to any deed relating to her estate." What this section does, is to give power to the Court to dispense with the husband's consent to a deed in certain circumstances. This is the whole object and effect of the section, and any annotation upon the section should be confined to the explanation of this, its only provision. At the end of the notes to the section we have one little note of six lines of this kind, headed "Husband's consent to deed dispensed with;" and probably no more was required, no more explanation being needed; but we have a whole series of notes explaining the law generally as to the position of a married woman in the circumstances mentioned—when she is deserted by, or is living separate from, her husband. There are seven pages, nearly one-seventh of the whole book, of notes of this kind: "when separate, wife's rights and liabilities are greater;" "husband an outlaw or imprisoned;" "are contracts of separation revocable?" "separation recalls the *præpositura*;" "wife's aliment while separate;" "expenses of action when separate;" and even "competency of alimentary actions in the Sheriff Court;" "effect of divorce upon property." Notes of this kind may be useful enough in their proper place, but what have they to do with the power to dispense with consent to a deed, or the consent to be dispensed with, the exclusive subject-matter of the section? Even with the ample range of annotation which the author has allowed himself,

it is difficult to see how he has managed to lug in such notes as the two last mentioned, "competency of alimentary actions in the Sheriff Court," and "effect of divorce upon property." The connection between the last of these, taking it as an illustration, and the provision of the section appears to be this. The Court is to have power to dispense with the husband's consent to a deed relating to the wife's property when she is deserted. But a great many other things may happen when desertion occurs. The wife may not only present a petition to the Court to have his consent dispensed with to a deed, but she may raise an action of divorce against him. Divorce has certain effects upon property, and it may be obtained not only for desertion, but for adultery. It is in some such way that we come to get illustrative notes of this kind:—"It was held by Lord Mure that where a husband and wife mutually divorced each other, although there was a finding that the wife committed adultery first, she was entitled to one-half of the goods in communion; but in *Fraser v. Walker*," and so on. The selection of illustrative notes ought to be determined by a consideration of the scope of the clause or section to be illustrated, not by a random association of ideas, or a train of thought in the mind, especially when, as in this case, the train is an excursion one—we mean in the sense of a train which makes excursions. It is difficult to see where one is to stop at this rate. We confess we looked with some apprehension at the notes to the first section, which begins, "Where a marriage is contracted," in case there should be an account of the various modes in which marriage may be contracted in this country. The delighted reader of Bayle's Dictionary must often be amused at the slender thread of connection between the notes and the text. But he forgives all this because of the independent value of the notes, containing, as they do, curious, interesting, and out-of-the-way information which he cannot obtain anywhere else. Mr. Birnie, however, draws his information from no such recondite sources, but from books which are in the hands of everybody, such as *Fraser on Husband and Wife*, to which the references are very frequent—six we have noticed on one page, and eight on another.

If the author is copious enough with his information about what the Act does not affect, he makes up for it by being scanty enough with his information about what the Act does affect. The book contains a great deal which we do not want in a book of this kind, and leaves out a great deal of what we do want and have a right to expect. The object of a commentary on a new Act is to state the doubts and questions and difficulties which have arisen under the Act, and even to suggest new ones; and then to give what explanation or solution the author is able to afford. The Married Women's Property Act is not without its reasonable share of the rough places that require to be made smooth, and the crooked paths that need to be made straight. This part of the work has

been done in a very perfunctory manner. In testing the author's manner of dealing with the questions that have arisen under the Act, for choice we took two which happen to have been noticed in the pages of this Journal. Section 1, sub-section 2, says: "The wife shall not be entitled to assign the prospective income" of her moveable estate, "or, unless with the husband's consent, to dispose of such estate." According to this, the wife cannot dispose of her estate without the husband's consent. Does "dispose" include a *mortis causa* as well as an *inter vivos* disposition? If it does, under this provision a wife cannot make a testament without her husband's consent, while, under the previously existing law, she could, when she had any separate estate. The argument that "dispose" does include *mortis causa* dispositions, is that "dispose" is the most comprehensive word you can use, if you wish to embrace all kinds of transfer, and indeed the appropriate word to use. That it is an appropriate word to use with reference to testaments, is shown by its use in the English Married Women's Property Act of 1882, which speaks of "disposing by will or otherwise." Now, all that the author says is this: "A wife might without her husband's consent bequeath her moveables by testament; . . . and it is not probable this section will be held to have interfered with that power." No indication is here given of the source of the doubt (*viz.* from the use of the word "dispose" unqualified), nor is there any attempt made at its settlement. It gives no help to say that it is not probable that so and so will be held. We want to know what the author himself holds, and his reason for holding it; or at any rate his reason for thinking it is not probable that this will be held. Again, the section says: "The wife shall not be entitled to assign the prospective income" of her estate, "or, unless with the husband's consent, to dispose of such estate." The prohibition against disposing of the income is absolute, and its absoluteness is emphasized by the prohibition against disposing of the estate made immediately after being qualified by this, "unless with the husband's consent." Upon this the author's remark is: "It is not clear from the words of the section if a wife can assign her prospective income without her husband's consent." Now, so far as the words of the section go, it is quite clear that she cannot. If this is not the meaning of the words, there is no meaning in language.

There is much in this book which, although out of place where we find it, would be quite appropriate to a treatise dealing with the law as to rights of property of husband and wife; and from something he says in the Preface, we imagine that when he started, the author had some idea of such a book floating in his mind. In the sentence with which the book opens it is said: "The second edition of Lord Fraser's work on *Husband and Wife* brought the law as to the property of married women down to the year 1878; but the Act of 1881 has made such important changes, that its publication in a separate form may not be inopportune." This is a queerly

constructed sentence. There is a want of correspondence between its two members. One could hardly select a more awkward fashion of making one's *début*. The only parallel to it is in the scene in *The Rehearsal*, where Prince Volscius hops on to the stage, one boot on and the other off. We entirely fail to see the force of the "but." How could the publication of a book on the subject with which the Act deals, three years before the Act was passed, make the publication of the Act itself, in a separate form, inopportune, whether the changes it made were important or not? In order to have made sense of the sentence, it ought to have run thus: "But the Act of 1881 has made such important changes that the publication of a new book on the same subject may not be inopportune." There is an evident confusion in this opening sentence, between a treatise on the law as to the property of married women, embodying the changes made by the Act of 1881, and a separate publication of the Act itself with annotations; and this confusion indeed runs through the whole book, greatly to its detriment. Earth is a good thing, and water is a good thing, but a mixture of the two is mud. A treatise on the law as to the property of married women may be a good thing, and an annotated edition of the Act of 1881 may be a good thing, but a mixture of the two is the work before us.

Obituary.

W. S. PURVES, Esq., M.A., LL.B., Advocate, died in December last.—Mr. Purves was called to the Bar in 1873, but never engaged in the practical work of the profession. We understand that the deceased gentleman has left a sum of money to the Advocates' Library, an example which we earnestly commend to the consideration of other members of the Bar.

WILLIAM LAMOND, Esq., Advocate, Sheriff-Substitute of Fifeshire, died on the 11th ult., aged 48.—Mr. Lamond was called to the Bar in 1858. After enjoying considerable practice for some years, he was appointed Sheriff-Substitute at Dunfermline, from which place he was transferred to Cupar on the retirement of Sheriff Beatson Bell.

G. HOME BINNING MUNRO, Esq., Advocate.—We have to record the death of this gentleman, which took place last month. He was admitted a member of the Faculty in 1828, but did not practise. There are only fourteen names senior to his on the current list of Faculty.

The Month.

The Black Cap.—The origin of the black cap of our judges is involved in some obscurity. The "Athenian Oracle" describes black as the fittest emblem of the grief the mind is supposed to be clouded with upon occasions of outward mourning; and "as death is the privation of life, and black a privation of light, it is very probable this colour has been chosen to denote sadness upon that account; and accordingly this colour has for mourning been preferred by most people throughout Europe." The practice of the English judges in putting on a black cap before they pronounce sentence of death upon a criminal, is explained by some as having this general meaning of sorrow, with perhaps a remnant of the ancient custom of covering the head as a token of grief. Thus "Haman hastened to his house, mourning, and having his head covered" (Esth. vi. 12). David, too, "wept as he went up, and had his head covered; . . . and all the people that were with him covered every man his head, and they went up, weeping as they went up" (2 Sam. xv. 30). Darius covered his head on hearing of the death of his queen, and Demosthenes when insulted by the populace did the same; while the mourners at ancient funerals drew their hoods over their heads. Hence the black cap has a distinct symbolic meaning: the judge puts himself as it were into mourning for the person who becomes doomed at the act, as though he were already dead. This, though throwing considerable figurative signification around the act, scarcely explains how it became and continued so decided a feature of our legal procedure. Another explanation of the solemnity, if it does not contain the true origin of the custom, bears the impress of greater likelihood, the reasons of adoption being more definite. In early times, the judges were, for the most part, ecclesiastics, and in spite of the Church's prohibition that no one in holy orders should pronounce sentence of death, they were, by virtue of their judicial office, often called upon to do so. Hence the judge, when the sentence of death had to be passed, laid aside his clerical character, and, putting on his cap to cover the clerical tonsure, thus showed that he acted now in a civil capacity alone. The greater number of clerical judges made the custom more universal, and we do not hesitate to accept this as the reason why the act is observed to this day.—*Hatter's Gazette*.

[A great deal of nonsense is from time to time talked about the judge's "black cap." It is quite probable that the origin of the custom of assuming the hat while passing sentence of death is due to the originally clerical character of the judges as stated in the above extract. But it is extraordinary this morbid interest which the public seems to take in the "black cap." We re-

member, during the trial of Jessie Maclachlan at Glasgow a good many years ago, that some perfervid young reporter on the staff of one of the newspapers, after describing the appearance of the Court-room and its occupants on the morning of the last day of the trial, gave a graphic account of the entry of the presiding judge. He said that his looks boded ill for the prisoner's chances of escape, and that he carried the black cap in his hand, which he ominously threw down on the bench before him. The reporter bitterly censured what seemed to him a want of decorum in not concealing the fateful head-gear until required. The real truth of the matter was, that the judge (who still happily survives) simply carried the "tricorn" or cocked hat which he had been wearing in his carriage, and which formed part of his official costume. Reporters should note in future that no black caps are manufactured specially to be used in the sentencing of prisoners. Those curious on the subject may see a real black cap without waiting for a murder or enduring the inconvenience of a trial, if they can only catch sight of a judge walking in the open air in his robes. It is about as rare as seeing a swan on dry land, but, like the latter event, it does occur.—*Ed. J. of J.*]

New Incorporated Society of Law Agents.—A movement, which was begun upwards of a year ago, to form a society in Scotland similar to the Incorporated Law Society of England, has now been brought to a successful conclusion. A royal charter, following upon a petition to Her Majesty by upwards of 600 solicitors representing all districts of Scotland, has just been granted, incorporating the petitioners and all law agents who may join the society into "The Incorporated Society of Law Agents in Scotland." Perpetual succession, a common seal, the power to hold property and make rules, bye-laws, and ordinances, and all other powers and privileges usually given to bodies corporate and politic, are conferred on the society. The first office-bearers are declared by the charter to be as follow, viz.:—James Robertson, LL.D., Professor of Conveyancing in the University of Glasgow, president; Charles Duncan, advocate, Aberdeen, vice-president: and Messrs. John A. Spens, Glasgow; John Downie, Glasgow; David Small, Dundee; David Dougall, Ayr; William Babbie, Dumbarton; John Symons, Dumfries; Alexander Cameron, Elgin; William K. Macdonald, Arbroath; William M'Clure, Greenock; David Patrick, Hamilton; John Gair, Falkirk; James W. Barty, Dunblane; James Anderson, Inverness; and Melville Jameson, Perth—members of council. A general meeting of the society must be held within six months. The other provisions of the charter are very similar to those contained in the charter of the English society. A meeting of the council is to be held in Edinburgh on an early day for the purpose of consultation as to the bye-laws and ordinances requisite for the government of the society.

Mr. Chamberlain and the Extension of the Employers' Liability Act to Seamen.—Seamen do not participate in the benefits which were secured to other classes of persons engaged in manual labour by the Employers' Liability Act. The Act concerns cases "where personal injury is caused to a workman," and by the definition clause (sec. 8) "the expression 'workman' means a railway servant and any person to whom the Employers' and Workmen's Act, 1875, applies." By section 13 of that Act it is provided that it shall not apply to seamen. Mr. Chamberlain has announced his intention, among other proposed shipping reforms, to bring in a bill to remove this exception, and to make the Employers' Liability Act applicable to seamen as to other workmen. In announcing this intention in his speech to the Newcastle ship-owners on the 16th of last month, he said: "Now, it is urged that there is a great difference between the position of the shipowners and the employers on shore. Any argument which can be used on that subject will, I am sure, have the fullest consideration, both from myself and also from Parliament. I own that, having thought it over a good deal, I find it very difficult to see that there is a real distinction between the state of the law which makes me answerable, for instance, if my coachman in London, whom I don't perhaps see for six months, runs over my groom in the performance of his work—makes me answerable to my groom for the injury which he has received." If no better argument can be produced in favour of the claims of the seaman than this, the result of a good deal of thinking over the matter, the seaman is in a remarkably poor plight. If his claim against his employer on account of injuries caused by the negligence of the captain is to be the same as that of a groom for injuries caused by the negligence of a coachman, ship-owners need entertain no alarm. A master is not liable to a groom for the negligence of a coachman. The Employers' Liability Act does not apply. For, in the first place, and this is the all-important reason, a coachman has not superintendence entrusted to him over the groom, and superintendence entrusted to one is the new basis of liability introduced by the Act. A coachman and a groom are simply fellow-servants, and the Act did not abolish the doctrine of collaborateur altogether; it merely made an exception to it in the cases where authority is delegated to a servant. In the second place, although a coachman could be regarded as a person entrusted with superintendence, he is not so in the sense of the Act, being a person "ordinarily engaged in manual labour." In the third place, the remedies of the Act are given, not to all persons who are employed, but only to workmen, and a groom is not a "workman" in the sense of the Act; that expression not including "a domestic or menial servant." It is always unfortunate when a minister, in a statement announcing his intention of altering the law, should show himself ill-informed as to the existing state of the law which he proposes to alter, especially when, as in this case, the error

he makes is a fundamental one—an error as to the cardinal principle of the Act which he proposes to extend. It is unfortunate, not merely because it is unseemly that the speaker should not be better informed, but because it needlessly throws discredit on what may be a very wise and salutary measure. It is doubly unfortunate in the present case, because, being as to the principle of the Act, it prevents the use of the most effective, nay, the only argument that can be used on behalf of the seamen's claims, which is that the *principle* of the Act applies to seamen, and therefore the operation of the Act should be extended to them. The principle is that the employer shall be liable for the negligence not of one fellow-servant to another, but of one whom he has entrusted with superintendence, and to whom he has delegated his authority. Accordingly the argument to be used on behalf of the seaman is not that a captain and a seaman are in the same relation to each other as a groom and a coachman, and that the master's liability for the captain's negligence should be the same as for a coachman's negligence, but that their relations are different, and the employer's liability should be different. A captain has superintendence entrusted to him over the seamen in the ship: why should the employer, the shipowner, not be responsible for his negligence by which an injury is caused to a workman, just as any other employer is for the negligence of any subordinate so entrusted? The answer which is now being made on behalf of the shipowner is, that a shipowner has less control over his ship and his subordinates than an employer by land. Contrast, it is said, the case of a mine-owner. A mine is always on the spot, but a ship seldom is. The answer to which will, when the question is fully discussed, probably be, that it is the superintendence which the subordinate has over the servant which is made the ground of liability under the Employers' Liability Act, not the superintendence which is exercised by the employer over the superintendent. If it were otherwise, a mine-owner who never looks near the mine, and delegates his authority entirely to his subordinate, would be totally free from liability. The authority that is delegated, not the authority that is retained, is what the Act has made the ground of liability. The more amply, therefore, it is delegated, the firmer is the ground of liability. But the argument to which we have referred proceeds on the directly opposite tack; and the principle on which it goes is not a limitation of the principle of the Employers' Liability Act, but a reversal of it. Take the new principle which unconsciously is advanced as a substitute for the present ground of liability under the Employers' Liability Act, and a mine-owner would be liable to a workman for the negligence of another mere workman because the mine-owner is supposed to be himself superintending.

A more apt argument from analogy than that given by Mr. Chamberlain might have been supplied by the case of *Grace v.*

Cawthorne, decided by the Queen's Bench Division, April 25. Why, it might be asked, should a stoker or engineman on board a steamship not have the same claim for compensation as a stoker or engineman at a coal-pit? In this case of *Grace v. Cawthorne*, the Queen's Bench Division held that an engineer in a steam vessel was a seaman, and so did not come under the Employers' Liability Act. In the case of *Wilson v. Zulista*, 19 L. J. Q. B. 49, noted in Campbell on Master and Servant, p. 238, it was held that a fireman and stoker on board a steamer was not a seaman, but a labourer or artificer. This, however, was a case under a Stamp Act. If seamen are to be excepted from the operation of the Employers' Liability Act on the ground, as is argued, of the shipowner necessarily having no superintendence over the ship, the reason of the exception applies not merely to those who are "seamen" in the strict sense of the term, but to all employed on board of the ship, and so it would be right to include those under "seamen" in the sense of the Act.

APPOINTMENTS.

Mr. EBENEZER ERSKINE HARPER, Advocate (1868), has been appointed Sheriff-Substitute at Wick in place of Mr. Spittal, who goes to Selkirk, as we noticed last month.

Mr. ALEXANDER EDWARD HENDERSON, Advocate (1868), has been appointed Sheriff-Substitute at Cupar in room of the late Mr. Lamond.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF CAITHNESS.

Sheriff THOMS and Sheriff-Substitute SPITTAL.

SIR J. G. TOLLEMACHE SINCLAIR, BARONET, v. ROBERT AND JAMES SUTHERLAND.

Agricultural Holdings Act, 1883, 46 and 47 Vict. cap. 62, § 28, does not entitle tenants whose ish is at Whitsunday 1884 to a year's notice, instead of the former warning of forty days.

This point was determined in this action of removing by the following interlocutors:—

"Wick, 30th November 1883.—Having heard parties' procurators, and considered the process, repels the defences stated by Robert Sutherland and James Sutherland, and decerns against them in the removing in terms of the prayer of the petition: Finds them liable in expenses to the pursuer; allows an account thereof to be lodged, and when lodged remits the same to the auditor of Court to tax and report, and decerns.

(Signed) CHARLES GREY SPITTAL.

Note.—The defenders hold the farms of Stainland and Geiselittle from the pursuer on a nineteen years' lease, which expires at Whitsunday next 1884. The pursuer has brought this action of removing in the usual form to have the defenders ordained to remove from the lands at Whitsunday 1884 as to houses, grass, and fallow break, and at the separation of the crop 1884 from the ground as to land under corn crop.

"The defence, and the only defence, is founded on the 28th section of the 'Agricultural Holdings (Scotland) Act, 1883,' in virtue of which the defenders contend they are entitled to receive from the landlord notice of not less than one year of his intention to bring the tenancy to an end; and the landlord having failed to give such notice, the lease is under the Act renewed by tacit relocation for another year. The words of the section are as follow: '§ 28. Notwithstanding the expiration of the stipulated endurance of any lease, the tenancy shall not come to an end unless written notice has been given by either party to the other of his intention to bring the tenancy to an end; (a) in the case of leases for three years and upwards, not less than one year, nor more than two years before the termination of the lease. . . . Failing such notice by either party, the lease shall be held to be renewed by tacit relocation for another year, and thereafter from year to year.'

"The defenders admit that but for the recent Act they could not have defended the action.

"The question therefore is, are they entitled to found upon the Act? I think they are not entitled to do so.

"The Act was passed on 25th August 1883, but section 34 declares that 'this Act shall come into force on the 1st day of January 1884, which day is in this Act referred to as the commencement of this Act.' *Prima facie*, therefore, this Act is at present altogether out of court, and it does not come into force until next year.

"But the defenders say that as their lease will still have about five months to run after the Act has come into operation, the Act applies, and they are entitled to twelve months' notice to quit.

"But how could they get twelve months' notice? According to their contention, if the pursuer wished them to remove at Whitsunday 1884, he was bound to give them notice at least as early as Whitsunday 1883. The Act, however, was not passed till August 1883, and the pursuer, unless gifted with the spirit of prophecy, which is not alleged, could not know at Whitsunday 1883 that the Legislature was to pass this Act in the following August. Supposing he had given notice on the very day the Act passed, that is, on 25th August 1883, that notice would clearly, under the Act, have been too short, being only nine months instead of twelve.

"The contention of the defenders must therefore amount to this, that every lease of three years and upwards naturally terminable at Whitsunday 1884 is by the Agricultural Holdings Act prolonged for another year.

"And this result must of course apply both to landlords and tenants. Tenants will be bound to remain in their farms until Whitsunday 1885, in the same way that landlords will be bound to maintain them in their tenancy until that term. This would be a startling result of the Act,

and can hardly, I think, have been contemplated by its framers. But there is another clause of the Act which I think has an important bearing on the question now under consideration. Section 40 provides that, 'Except as in this Act expressed, nothing in this Act shall take away, abridge, or prejudicially affect any power, right, or remedy of a landlord, tenant, or other person vested in or exerciseable by him by virtue of any other Act or law, or under any custom of the country or otherwise, in respect of a lease or other contract, or of any improvements, deteriorations, away-going crops, fixtures, tax, rate, teind, rent, or other thing.

"Now the view stated by the defenders would undoubtedly prejudicially affect the rights and powers of both landlords and tenants. It would in the present case effectually prevent the landlord from exercising his right of removing, according to usual forms of law, a tenant whose tenancy naturally expires at Whitsunday 1884. That result is certainly not expressed in the Act, and I therefore come to the conclusion that the 'Agricultural Holdings (Scotland) Act, 1883,' which only comes into operation on 1st January 1884, cannot be founded on as a defence to the present action. (Intd.) C. G. S."

On appeal the Sheriff (Thoms) pronounced this interlocutor :—

"*Wick, 29th December 1883.*—The Sheriff having resumed consideration of the defenders' appeal, with reclaiming petition for them, dismisses said appeal, and adheres to the interlocutor submitted to review, and decerns, with additional expenses to the pursuer as the same may be taxed. GEO. H. THOMS."

Act. John M. Nimmo, solicitor, Wick—*Alt.* Peter Keith, solicitor, Thurso.

Note.—Two cases involving the same point have been decided in the same way by the Sheriff and Sheriff-Substitute of Argyleshire.

Notes of English, American, and Colonial Cases.

SALVAGE—Loss of profits—Damage to salvors—Evidence.—Evidence of the amount of loss of profits and of the damage sustained by a salving vessel, in consequence of the performance of salvage services, is admissible, such loss and damage being ingredients to be taken into consideration when making a salvage award.—*The Sunnyside*, 52 L. J. Rep. P.D. and A. 76

SALVAGE—Misconduct of salvors—Forfeiture of salvage reward.—A vessel with her cargo was saved from a position of danger by salvors, but, instead of being taken into a secure berth, was anchored where it was, in the opinion of the Court, negligent and unskilful to place her. The vessel afterwards, from the force of a gale which came on, dragged her anchor and sank. Considerable expense was incurred in raising her, and the cargo was seriously damaged:—*Held*, that as the misconduct of the salvors resulted in a loss which was not clearly less than that from which the vessel had been saved, the salvors were not entitled to salvage reward.

The Yan Yean, 52 L. J. Rep. P.D. and A. 67.

THE JOURNAL OF JURISPRUDENCE.

OBSERVATIONS ON NEGLIGENCE.

HEAVEN *v.* PENDER.

THE case of *Heaven v. Pender*, L. R., 11 Q. B. D. 503, is remarkable for the attempt made, in the opinion given by the Master of the Rolls, to define the area of responsibility for negligence in cases where the obligation to use care and skill arises independent of contract, and to sum up in one large and comprehensive proposition the partial and fragmentary rules which are made to do duty on the subject. The proposition submitted by the learned judge was dissented from by the other members of the Court as much too sweeping, going far beyond a generalization of the existing rules, and in reality introducing ground of liability not hitherto recognised. Apart from the novel views for the enunciation of which the case was the occasion, the case itself, looking merely at the grounds of decision actually taken, is noteworthy and instructive, first as bringing into relief a somewhat arbitrary limitation of liability in cases of injury resulting from a breach of contract, or of fault consisting in a breach of contract; and secondly, as illustrating the straining to which the Court is driven by this limitation, to put upon a minor and subsidiary doctrine regarding liability for negligence in order to meet the justice of the case. It is to these two last-mentioned points of interest in the case that we shall first direct attention. The case was this. A ship was sent to the defendant's dock to be repaired. Under a contract with the shipowner, the defendant, the dockowner, supplied a staging, slung up in the ordinary way outside the ship, to be used by the workmen when the ship was being painted. After the stage was handed over to the shipowner it was out of and beyond the dockowner's control—the work of painting being directed by or contracted for by the shipowner. The staging proved defective, gave way, and the plaintiff, a work-

ing painter engaged on this staging, was injured. He brought this action against the dockowner for negligence in supplying an unserviceable and dangerous staging. The Court of Queen's Bench held the action did not lie, giving effect to the limitation of liability for negligence adverted to, which is this, that where the negligence complained of consists in a breach of contract, it is only a person who is a party to or privy to the contract who can sue. The duty arises out of contract, and nobody but a party to the contract can raise action for neglect of the duty. The leading case on the subject is *Winterbotham v. Wright* (1842), 10 M. and W. 109. In that case a coach-builder who, under a contract with the Postmaster-General to supply road-worthy vehicles, supplied a coach which proved defective and broke down, in consequence of which the coachman was injured, was sued by the coachman. The Court of Exchequer held that the action did not lie, the coachman being no party to the contract. "We ought not," said Lord Abinger, C.B., "to permit a doubt to rest upon this subject, for our doing so might be the means of letting in upon us an infinity of actions. . . . Here the action is brought simply because the defendant was a contractor with a third person, and it is contended that thereupon he became liable to everybody who might use the carriage. . . . Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and dangerous consequences, to which I can see no limit, would ensue." Baron Alderson observed: "If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. *The only safe rule is to confine the right to recover to those who enter into the contract*: if we go one step beyond that, there is no reason why we should not go fifty." In *Heaven v. Pender* the Queen's Bench Division could see no distinction between the two cases, the case of the coach and the coachman, and the case of the staging and the painter. It was solely under a contract that the defendant supplied a coach in the one case and a staging in the other; it was under an express in the one case, and an implied term of the contract in the other, that the defendant became bound to see that the article supplied was sufficient for its purpose; and in neither case was the plaintiff a party to the contract under which the obligation arose. The Court of Appeal reversed the judgment of the Queen's Bench Division. The large and sweeping proposition enunciated by the Master of the Rolls, which, if correct, made the defendant liable in the circumstances, was not accepted by the other judges of the Court. It was on a minor ground of liability that the Court, including the Master of the Rolls, proceeded, viz. the doctrine of "invitation to enter." The doctrine is thus stated by Blackburn, J., in *Smith v. Steele*, L. R., 10 Q. B. 125: "There is an obligation on the part of the occupier of property, whether fixed or moveable, to those who, at his invitation, whether express or implied, come on

that property to take by himself and servants reasonable care that the person so coming shall not be exposed to unusual danger, and that obligation extends to the workmen sent by a tradesman to repair part of the machinery." The principle was so applied in *Indermaur v. Dames*, L. R. 1, C. P. 274. So, too, it has been said in the case of a shop or warehouse, that the shopkeeper, or warehouse-keeper, invites his customers to enter, and if he leaves the premises in a dangerous condition he is said to lay a trap for them. This principle was thought to apply in the present case. The defendant was the owner of a dock for the repair of ships, and provided for use in the dock the stages necessary to enable the outside of the ship to be painted while in the dock, and the stages which were to be used only in the dock were appliances provided by the dockowner as appurtenant to the dock and its use. After the stage was handed over to the shipowner it no longer remained under the control of the dockowner. But when ships were received into the dock for repair and provided with stages for the work on the ships which was to be executed there, all those who come to the vessels for the purpose of painting and otherwise repairing them were there for business in which the dockowner was interested, and they, in my opinion, must be considered as invited by the dockowner to use the dock and all appliances provided by the dockowner as incident to the use of the dock. To these persons, in my opinion, the dockowner was under an obligation to take reasonable care that at the time the appliances provided for immediate use in the dock were provided by the dockowner they were in a fit state to be used—that is, in such a state as not to expose those who might use them for the repair of the ship to any danger or risk not necessarily incident to the service in which they are employed. That this obligation exists as regards articles of which the control remains with the dockowner was decided in *Indermaur v. Dames*; and in *Smith v. London and St. Katharine Dock Company*, L. R. 3, C. P. 326, the same principle was acted on. I think the same duty must exist as to things supplied by the dockowner for immediate use in the dock, of which the control is not retained by the dockowner, to the extent of using reasonable care as to the state of the articles when delivered by him to the ship under repair for immediate use in relation to such repairs. For any neglect of those having control of the ship and the appliances he would not be liable, and to establish his liability it must be proved that the defect which caused the accident existed at the time when the article was supplied by the dockowner; *per* Cotton, L.J. In *Smith's* case the dock company provided gangways from the shore to the ships lying in the dock, the gangways being made of materials belonging to the dock company, and managed by their servants. The plaintiff in the action went on board a ship in the dock at the invitation of one of the ship's officers, and while he was on board, the servants of the dock company, for the

purposes of the business of the dock, moved the gangway so that it was, and to their knowledge, insecure. The plaintiff in ignorance of this insecurity returned along it to the shore, the gangway gave way, and he was injured. It was held that the dock company having "invited" the plaintiff to enter, there was a duty on them towards him to keep the gangway reasonably secure.

At best this theory of "invitation" is a questionable one, as accounting for the liability sought to be imposed. It seems to be resorted to, for want of a better, in circumstances where it is felt that there has been negligence for which the person guilty of it ought to be liable, and there is a difficulty in fixing upon a definite ground of liability, keeping clear of the rule laid down in *Winterbotham v. Wright*. In resting the obligation upon invitation, resort is made to what is an illustration of whatever principle there is, rather than to the essential ground of liability. Nor is the nomenclature a fortunate one. As observed by the Master of the Rolls in this case, "By opening a shop you do not ask A. B. to come in and buy; you intimate to him that if he pleases to come in he will find things which you are willing to sell." Still less is it accurate to speak of "laying a trap" for a customer, as it has sometimes been called. The shopkeeper whose premises are in a defective state may do a wrong thing, but he certainly does not lay a trap for anybody. As regards the "entering," this is not accurate either. The principle has been in this case extended far beyond mere "entry" upon premises. It is no doubt true that a painter does enter upon a staging before he can use it; but the entry is an accident, it is the using of the article which is the thing of importance, and so, indeed, it has been put by Lord Justice Cotton. The same reasoning would apply to any other appurtenance the use of which did not require "entry" into or upon it. Setting aside for the moment these general objections, the serious, and what seems to us the conclusive objection to the application of the principle in the present case, is that it wants the essential element of what was thought to lay a basis of liability in other cases. Lord Justice Cotton remarks that in the *Katharine Dock Company's* case the gangway was under the control of the dockowner, while in this case the staging had passed from his control. Now this makes all the difference in the world. Invitation, or to put it on a lower ground, permission to enter upon or to use a thing implies command or control over it. Invitation implies the power to stop the invitation. Here the dockowner could not put an end to the invitation, say, when he discovered, what had originally existed but he was not aware of, that the staging was defective. It seems a strange kind of invitation the power to give which, or to withhold which, or to determine to whom it is to be given, depends upon the will of another. A dockowner who provides appurtenances to be used during a certain term, viz. during the repair of a ship, is only a lessor of the article provided.

On this principle not the shopkeeper, or not merely the shopkeeper would be responsible to any customer suffering injury by entering upon premises in an unsafe condition at the time of letting, but the landlord of the premises. It is said that the ship was still in the dock. What does it matter whether the ship were in or out of the dock? If the being in the dock makes the dockowner liable, then he is liable for the defective state of the ship equally as for the defective state of the staging, his control over either being the same. If the being or not being in the dock is of no importance, then the only ground of liability which remains is the defective state of the staging, and any duty to provide a proper staging arose under the contract to which the plaintiff was not a party. But this just brings us back to the ground of liability which was negatived in the case of *Winterbotham v. Wright*. It cannot be said that the cases are distinguishable in this respect that in *Heaven v. Pender* the use of the staging contemplated was a use by a limited class—the persons likely to use it or necessarily using it. In the first place, if there is any person likely to use a coach, or by whom it must necessarily be used, it is a coachman. In the second place, the case of *Winterbotham* was put clearly on the ground that the right to sue belongs only to a party to the contract, and a limited class by whom the article is to be used is outside the contract just as much as “all the world.”

The case of *Winterbotham v. Wright* is an English case, but the same principle has been laid down as forming part of the law of Scotland. In the Scottish appeal case *Robertson v. Fleming*, May 30, 1861, 4 M.Q. 167, it was distinctly laid down that an agent was not responsible for negligent performance of his duty except to the person who employed him. Lord Chancellor Campbell said: “I never had any doubt of the unsoundness of the doctrine that A. employing B., a professional lawyer, to do any act for the benefit of C., A. having to pay B., and there being no intercourse of any sort between B. and C.,—if through the gross negligence or ignorance of B. in transacting the business, C. loses the benefit intended for him by A., C. may maintain an action against B., and recover damages for the loss sustained. If this were law, a disappointed legatee might sue the solicitor employed by a testator to make a will in favour of a stranger, whom the solicitor never saw or before heard of, if the will were void for not being properly signed and attested. I am clearly of opinion that this is not the law of Scotland nor of England, and it can hardly be the law of any country where jurisprudence is cultivated as a science.” Lord Wensleydale observed: “He only who by himself, or another as his agent, employs the attorney to do the particular act in which the alleged neglect has taken place, can sue him for that neglect, and that employment must be affirmed in the declaration in the suit in distinct terms. . . . It is said that by the law of Scotland, quite independently of the question who the contracting parties

are, whenever an attorney or an agent is employed by any one to do an act which when done will be beneficial to a third person, and that act is negligently done, an action for negligence may be maintained by the third person against the attorney or agent. I cannot think that any such proposition is made out to be part of the law of Scotland." Being the opinion of the judges of the Court of highest resort, we are bound to accept these statements as authoritative expositions of the law of Scotland. But there are expressions of opinion anterior to this case which show that such a representation of it might not have been at once accepted as an indisputably correct statement of the law of Scotland upon the subject. In *Goldie v. Goldie*, July 8, 1842, 4 D. 1489, a wife had repudiated a post-nuptial settlement by which she renounced her legal rights and had betaken herself to these legal rights. It proved that she had no right to terce, the sasine by which her husband intended to have himself infest turning out to be inept, owing to a blunder of the agent employed by him to prepare the deed. The wife was held to have no claim of damages against the agent, apparently on the ground that the blundering of the sasine did not necessarily lead to the loss of all benefit to her from her husband's estate. But Lord Fullerton observed: "I could not hold that the widow could have no action against the agent merely because she was not his employer. It seems to be admitted that in the ordinary case, if a deed in favour of a third party is rendered unavailing by the agent's neglect to obtain his employer vested in a right, the agent is liable to make reparation to that third party."

We greatly question the justice of the rule that where the negligence consists in a breach of contract, it is only the parties to the contract who have a right to sue for damage for the injury resulting. The act of negligence may have more than one legal aspect. It may be a fault, an act of *culpa*, as well as a breach of contract. The circumstance that a party has no right to found upon it in an action regarded in the latter relation should not deprive him of his right to sue upon it regarded in the former relation. What ought to be taken into account is not merely the origin of the negligence, but the consequences. When these consequences, direct and proximate consequences, are not confined to the parties to the contract, why should the remedy be so confined? The matter stands in this position. Here is the wrong-doer, and here is the person who has suffered injury by the wrong. Is there no way the latter can get at the former, and compel him to make reparation for the wrong? Is he to be prevented by this unnatural and arbitrary barrier raised by the circumstance, that the wrong done was done in the execution of a contract to which the person suffering injury was not a party? Many illustrations may be given of the inequity of such a rule. Take Lord Campbell's illustration of the legatee disappointed of a legacy. Suppose a man

marries his deceased wife's sister, and the children of this union are brought up just as if they were lawful children. In law the children are illegitimate, and consequently would have no share in their father's estate on his death. As often happens in such a case, the father makes a will leaving to the eldest son of this union the estate, which if the union had been a lawful marriage would have come to him in course of law. Through a mere technical error of the agent employed to prepare the deed, the will turns out valueless, and the son, brought up in the belief that he is to succeed to his father's estate, is left penniless. According to the rule stated, the agent escapes scot-free. The son has no action because he did not give the employment. There can be no action by the father, for he is dead, nor by his legal representatives, for they have suffered no loss, but have gained a benefit.

There are, however, we think cases in which, according to the law of Scotland at least, the neglect of a duty arising under a contract gives rise to an action at the instance of persons not parties to the contract. It is under their contract of carriage with a passenger that a railway company's obligation arises to take reasonable care that the passenger is carried safely. But suppose the passenger is killed, a parent, for example, who is no party to the contract, is entitled to reparation. Such an action lies not merely against the company which has actually committed the wrong act, the delict, but against the contracting company, which has simply failed in its duty under the contract. See *Horn v. North British Railway Company*, July 13, 1878, 5 R. 1055, which was "an action for a wrong done to a father by reason of a fault committed by a railway company in the course of the execution of a contract with the son."

In defence of the limitation, which is the *ratio* of *Winterbotham v. Wright*, and which seems to be settled in England at least, it is pleaded, to quote the words of Lord Abinger, that without it "there might be an infinity of actions." And Baron Alderson said in the same case: "If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop." The point at which they would stop would be when the injury ceased to be the direct consequence of the fault. "Remoteness" would be the limit, a natural, reasonable, and recognised limit. If we take the words "infinity of actions" as referring to the number of actions to which the recognition of liability would lead, we fail to see that this is a good legal ground of limitation. The number of cases in which a remedy is allowed ought to be in proportion to the number of cases in which there is injury resulting from a wrong done or fault committed. A railway collision leads to a multitude of actions; but has this ever been held to be a reason for denying a right of action in such a case? The multitude of actions which the admission of a ground of liability would lead to, and the consequent deterrent influence upon industrial enterprise, may be a

reason for a limitation being placed by the Legislature acting on motives of public policy and convenience, but it is no logical ground for a limitation on the operation of a principle. We suspect, however, that sometimes it has been the real inducement for seizing upon some distinctive circumstance, and making it serve as a convenient break in the operation of a principle of liability. The limitation to a master's liability made by the doctrine of *collaborateur* is possibly an illustration of this. Why should a master not be liable for the fault of his servant in a question with another servant who has suffered injury, as well as in a question with one of the general public who has suffered injury? The alleged reason is, that when a workman takes service with an employer it is an implied term of the contract that he takes the risk of his fellow-servants' negligence. This, as everybody knows, is not the fact. But if such actions were allowed, their number would be so great as to be a serious drag on the business enterprise of the country, and so this point has been seized upon as a convenient break.

In *Heaven v. Pender* the Master of the Rolls, while agreeing with Lords Justices Cotton and Bowen in holding that the case came within what may be thought the partial, provisional and somewhat makeshift principle of "invitation," and holding it enough for the purposes of the particular case, thought the occasion warranted him in taking a bolder flight, and accordingly he laid down a very general proposition as to what is actionable negligence, upon which proposition he preferred to rest his decision. The following is a summary of his Lordship's statement on the subject. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the *duty* of observing ordinary care and skill, by which neglect the plaintiff suffers injury in his person or property. The obligation may arise from contract, in which case the obligation to use care and skill need not be regarded as a duty. But such a duty may arise from one person to another when there is no contract between them with regard to such duty. Two drivers meeting have no contract with each other, but under certain circumstances they have reciprocal duties towards each other. So two ships navigating the sea. A railway company which has contracted with one person to carry another has no contract with the person carried, but has a duty towards that person. So the owner or occupier of a house or land who permits a person or persons to come to his house or land has no contract with such person or persons, but has a duty towards him or them. Now, what is the proper definition of the relation between two persons other than the relation established by contract or fraud, which imposes on the one of them a duty towards the other to observe, with regard to the person or property of such other, such ordinary care or skill as may be necessary to prevent injury to his person or property? When two drivers or two navigators

are approaching each other, such a relation arises between them when they are approaching each other in such a manner that, unless they use ordinary care and skill to avoid it, there will be danger of an injurious collision. This relation is established in such circumstances between them, not only if it be proved that they actually know and think of this danger, but whether such proof be made or not. It is established, because any one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill under such circumstances there would be such danger. And every one ought, by the universally recognised rule of right and wrong, to think so much with regard to the safety of others who may be jeopardized by his conduct; and if, being in such circumstances, he does not think, and in consequence neglects to use ordinary care and skill, and injury ensues, the law, which takes cognizance of and enforces the rules of right and wrong, will force him to give an indemnity for the injury. In the case of a railway company carrying a passenger with whom it has not entered into the contract of carriage, the law implies the duty, because it must be obvious that unless ordinary care and skill be used the personal safety of the passenger must be endangered. But the same duty to use skill and care arises in quite different sets of circumstances. With regard to the condition in which an owner or occupier leaves his house or property, it is said, not very accurately indeed, that there is an invitation to enter, or that a trap is laid. But these phrases, though they cover the circumstances to which they are particularly applied, do not cover the other set of circumstances mentioned from which an exactly similar legal liability is inferred. There must therefore be some larger proposition which involves and covers both sets of circumstances. There must be one common proposition which would cover the similar legal liability inferred in the cases of collision and carriages. The proposition which these recognised cases suggest, and which is therefore to be deduced from them, is that *whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.* Without displacing the proposition mentioned as applicable to the particular circumstances in respect of which they had been enunciated, this proposition included, the Master of the Rolls thought, all the recognised cases of liability and was the only proposition which covered them all.

The Master of the Rolls proceeded to illustrate the proposition and its limits by considering its application to the class of cases of which the case immediately before him was an example. "Let us apply this proposition to the case of one person supplying

goods or machinery, or instruments or utensils, or the like, for the purpose of their being used by another person, but with whom there is no contract as to the supply. Whenever one person supplies goods, or machinery, or the like, for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognise at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And for a neglect of such ordinary care or skill whereby injury happens, a legal liability arises to be enforced by an action for negligence. This includes the case of goods, etc., supplied to be used immediately by a particular person or persons, or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once, by such persons, before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill, as to its condition or the manner of supplying it, would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used, or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition, or the manner of supplying them, would not probably produce danger of injury to person or property. The cases of vendor and purchaser, and lender and hirer, under contract, need not be considered, as the liability arises under the contract, and not merely as a duty imposed by law, though it may not be useless to observe that it seems difficult to import the implied obligation into the contract, except in cases in which, if there were no contract between the parties, the law would, according to the rule above stated, imply the duty."

In support of his proposition, the Master of the Rolls made an elaborate review of the cases bearing upon the subject, such as *George v. Skirvington*, L. R. 5, Ex. 1, where a chemist was found liable for his negligence in compounding a hair-wash, by which a woman was injured, the sale being not to the person injured, but to her husband. Lord Justice Cotton, in whose opinion Lord Justice Bowen agreed, dissented from the proposition, "inasmuch as there were many cases in which the principle was impliedly negatived." One of these many cases was *Collis v. Selden*, L. R., C. P. 495, the chandelier case. There a man coming into a public-

house was injured by the fall of a chandelier improperly hung. He was found to have no action against the tradesman who had supplied the chandelier. The Master of the Rolls endeavours to get over the case by saying there was nothing to show that the tradesman supplying the chandelier "knew more of the probability of the plaintiff rather than any other member of the public being near the chandelier." But the tradesman knew the public-house was to be used by the publican's customers, of whom it turned out the plaintiff was one, and if he did think at all, he knew unless he exercised skill in hanging the chandelier, there was danger to these customers using the public-house. The case is just the same, so far as the proposition in question is concerned, as the painters and the staging. In the case of the customers, the tradesman knew nothing of the probability of the particular customer using the public-house, but in the other case the dockowner knew as little of the particular painter using the staging. The only difference between the two cases is that in the one case the man injured was one of the general public, and in the other he was one of the limited class of painters. But this is immaterial, so far as this proposition is concerned. The class to whom we have to look is not the class from which the injured persons were recruited, so to speak, but the class to which they belong for the purposes of the proposition, and that is the persons to whom danger would result if ordinary care was not used. Who are these? In the one case, the customers using the public-house where the chandelier was hung (and any one belonged to that class as soon as he became a customer), and in the other case, the painters working on the ship and using the staging. The customers using the public-house just as much as the painters using the staging are persons to whom the tradesman or the dockowner, if he thought at all, would at once recognise that if he did not use ordinary care and skill in fixing the article, or providing a proper article, he would cause danger to those persons, which, according to the principle proposed for acceptance, is all that is necessary to create a duty to use care and skill to avoid such danger.

One objection to the proposition of the Master of the Rolls is, that, be it correct or incorrect, it is not fitted to be of practical service. Any proposition to be of service as a rule, must be brief, terse, easily understood, and easily remembered. This statement is not easily mastered, and does not readily fix itself in the memory after it is understood. Contrast this lengthy and involved proposition with the maxim *culpa tenet suos auctores*. But a more weighty objection to the proposition, an objection not to the form but to the matter of it, is that it is too wide. If the limitation to which we have adverted, that reparation for the injury caused by a fault which consists in a breach of contract cannot be had except by those privy to the contract,

be an undue narrowing of the area of legal responsibility, this new proposition is an equally undue extension of it. In it there seems to be a substitution of moral duty for obligation as a basis of legal responsibility. Mere knowledge of the fact that danger will result from the absence of ordinary care and skill is not a ground of obligation to use such care and skill. Surely there are many cases in which one is, by circumstances placed in such a position with regard to another that every one of ordinary sense, who did think, would at once recognise, nay, *where the person does recognise*, that if he does not use ordinary care in his own conduct with regard to these circumstances, he will cause danger of injury to the other, and yet, although there may be a moral duty to use ordinary care and skill to avoid that danger, he is not *bound* to do so, there being something else needed to lay the basis of a legal obligation. Suppose you get planted next a drunk man on the top of a coach, and the incapable passenger leans against you. In getting off it is obvious that, if you do not use ordinary care and skill having regard to the circumstances in which you are placed, that drunk man will be very apt to tumble off. Suppose you regulate your own conduct in getting off without the slightest regard to the circumstances in which you are placed, in consequence of which your fellow-passenger tumbles off and hurts himself, you are not acting the part of the Good Samaritan, but we do not think an action would lie.

LEGAL COSTUME.

THE practice of wearing a wig as a special part of legal costume is wholly modern. It has been seen that the head-dress of the advocates of the Parliament of Paris was a furred cap which they were permitted to wear in respect of the honour in which they were held by the Parliament. A very early illumination, depicting the Court of Queen's Bench, shows both judges and serjeants to be adorned with a coif or close-fitting cap,—something like the old-fashioned Scotch wife's "mutch." Sometimes the coif had a round black patch on the crown,—a reminiscence of an earlier custom of wearing a black skull-cap above the white coif. It is to this that Hudibras refers when he says:—

" By black caps, underlaid with white,
Give certain guess at inward light ;
Which serjeants at the gospel wear,
To make the spiritual calling clear."

Clergymen followed the same custom, for George Fox, the Quaker, observes "that the priests in those times had on their heads two caps, a black one and a white one;" and Petyt says "the white

borders upon his black cap made him look like a black-jack tipped with silver." And in a "Satyr against Hypocrites," we find—

"Now what a whet-stone was it to devotion,
To see the pace, the looks, and ev'ry motion
O' th' Sunday Levite, when upstairs he march'd !
And first, behold his little band stiff starch'd ;
Two caps he had, and turns up that within,
You'd think he were a black pot tipp'd with tin."

Then, again, Spelmanni under "Serjeant, Serviens ad legem," says : "Serjanti stantes promiscue extra repagula curiæ, quæ Barros vocant, absque pilei honore, sed tenui calyptra, que coifa dicitur, induti, causas, agunt et promovent." The coif at a later time was adorned with long lapels, which hung down over the ear and then fell across the shoulder on the breast. From these have come in succession the enormous full-dress wigs, curling down over shoulder and breast, worn by the higher legal dignitaries in England at the present day. But the lapelled coif of the English bar seems simply a development of an ecclesiastical head-dress much affected by certain religious orders at an earlier historical period. For instance, pictures of Greek bishops of the Byzantine Empire show a species of cowl adorned with pendants which hung over the breast. In the tenth century a cowl or coif with bands was worn by Capuchin and Benedictine monks, and complaints were offered at the Council of Laon in 972 against the "bonnets à oreilles" being worn longer than permitted by the rule set down by the Council of 817 at Aix-la-Chapelle, which provided that the cuculles or ear lapels should not measure more than two coudées or 90 centimetres. The adoption of the coif as a head-dress in the law courts, especially of England, is not to be wondered at, seeing the close connection there was between the law courts and ecclesiastics. We cannot find that the coif was ever worn in Scotland by either bench or bar. The earliest portrait we have is that of Sir Thomas Hope, King's Advocate from 1626 to 1640 ; and he wears over his own close-cut hair a black velvet cap ornamented with lace or fur. He also wears a beard and moustache. Lord Chancellor Spottiswoode, in the same century, has his own hair, and so also has the first Lord Napier, *circa* 1645, the son of the inventor of logarithms. Lord Napier, who was an extraordinary Lord of Session, has his hair cut somewhat short, and a pointed beard and moustache. Sir George Mackenzie, King's Advocate from 1671 to 1686, is represented with a black wig,—the modest precursor of the enormous bob-wigs which Charles II. brought into fashion after the Restoration. Periwigs were in fact quite unknown in any form in Scotland till towards the end of Queen Mary's reign, when the French—

" . . . gave us laws for pantaloons,
The length of breeches, and the gathers,
Port-cannons, periwigs, and feathers."

Lord President Lockhart (1685-88) is the first Scottish legal luminary adorned with the full-bottomed wig. In his case it is brown, and so deep as to fall over the breast. Lord President Dalrymple (1695-1737) has a grey wig coming down over both shoulders. During the same Lord President's reign, Lord Justice-Clerk Pollock has a wide high-standing grey wig, Lord Chief Baron Smith a brown bag-wig, and Lord Newhall a black bag-wig. Lord President Forbes (1737-47) has a white full-bottomed wig flowing over the shoulders; and Lord President Dundas in 1754 has a grey periwig,—evidently something like the wig known as the "Ramillies," which had plaits at the back tied with bows at top and bottom,—the fashion of a former generation, when "full-bottomed wigs were worn by the learned professors and those who affected gravity," being evidently no longer regarded. Topham in his "Letters from Edinburgh," dated 1775, referring to the dress of the citizens, says that "the gentlemen, after the custom of the French, wear their hair in bags, especially the advocates and professors of the college, who commonly dress in black." In succession come Vice-Dean Crosbie and Lord President Campbell at the end of last and beginning of the present century, with the powdered wigs becurled and betailed. Quicherat says that in France, where the wig had been adopted by the bench and bar, in obedience to the prevailing fashion, about 1790, the perruque began to be cast aside whenever people possessed a sufficient growth of hair of their own. "The young advocates were the first authors of this fashion, which passed from the bar into the ranks of the magistracy, and from thence to the world." Lord Cockburn refers in his *Memorials* to the semi-social, semi-political dispute in Edinburgh at the beginning of the century over powder *versus* no powder on wigs. There is a lingering tradition round the fireside in Parliament House as to the discomfort of the old perruques, made partly of human and partly of goats' hair. They had to be dressed each morning. Grease entered largely into the composition of the dressing, which enabled the powder or more plebeian flour to adhere to the wig; and the "fireside clique" were easily distinguishable from the white spots on their gowns, caused by the melting of the well-dusted grease and the consequent "drip." Like many other professional modes, however, that of the powdered wig passed away, the late Mr. Wm. Pitt Dundas being the last to indulge in the luxury, which, in fact, he did as long as he lived. Powder or no powder, the judges of our Supreme Court never discarded the wig. The late Lord Moncreiff and Lord Jeffrey are both credited with having been the first to adopt the present wig of grey horse-hair, with its formal curls and double queue. A recently-appointed judge ordinary has made a further innovation, by donning a wig without the archaic curls, thus returning in some measure to the ancient coif. When wigs came to be discarded in general society, the

youthful members of the Scottish bar, following the example of their French *confrères*, also cast them aside. Instead of adopting a special head-dress, like the ugly, if quaint, high black cap of the French advocates, the Scottish pleaders stalked about Parliament House wearing their ordinary hats,—only doffing their head-gear when addressing the court. And here it may be stated that the Lord Advocate enjoyed the privilege—now no longer insisted upon—of pleading with his hat on. Forbes, in his introduction to his *Collected Decisions*, published in 1713, says that the Lords sat at a semicircular bench, and that the “bar, like a diameter line, at which the advocates, and even the King’s solicitors, stand and plead uncovered,” was opposite to the bench. Her Majesty’s Advocate sat in a chair within this bar, and pleaded “always with his hat on.” The latter practice, it is pointed out in the Notes to Tait’s *Index*, was introduced in the time of Sir Thomas Hope, who was Advocate to Charles I. “This indulgence he owed to his having two sons on the bench, Sir John, his eldest, and Sir Thomas, Lord Kerse.” So late as 1840, fully a half of the advocates attending the Supreme Court did not wear wigs. The immediate cause of the general adoption of the wig is said to have been a joke perpetrated upon one of these wigless and be-hatted advocates, who was, moreover, an extensive landed proprietor. The story goes that this unlucky gentleman happened to be standing near the door of the Second Division, when a grimly jocose Lord Advocate approached and called to him, “Macer, open the door.” It was too much and too hard to be taken for a humble tipstaff, and wigs were thereafter all but universally adopted as part of the bar costume. A few conservative members, however, refused to follow the fashion, and the honour of being the last advocate who went about Parliament House with a hat instead of the more courtly wig, was the late Mr. John Park.

We have failed to discover that the Writers to the Signet ever, as such, wore any peculiar head-gear.

We come now to the third feature in legal costume,—the white necktie of the Scottish bar and the bands of the English. It is a very easy matter to trace the natural history, so to speak, of the white necktie, but it is quite another thing when we turn to the consideration of that of bands. The origin of bands, in fact, has given rise to nearly as much speculation as the origin of evil. Some learned authors ascribe to them an ecclesiastical source; others a secular beginning. The former seek a religious sanction for the precious bands in some portion of the limited attire of the pagan priests of ancient Rome,—indeed, one perfervid enthusiast believes them a relic of phallic worship; the latter find the primitive bands in the everyday dress of much later times, and of course they are by far the most cynical and contemptuous in their regard for the paltering of learned costumic archæologists. Planché may be taken as the special pleader of the secularists.

Bands, he insists in effect, were the collars which in the seventeenth century supplanted ruffs. The cavaliers were distinguished by the breadth of their bands and by their borders of lace; whereas the Puritans, followed by the official classes, adopted narrow bands. Then he goes on to say: "After the introduction of the cravat or neckcloth, the bands were confined to the learned professions. They appear in the early part of the eighteenth century as merely the elongated ends of the shirt collar, but they soon became independent of it, and assumed the shape they bear in the present day,—two meaningless strips of lawn or fine French cambric, hemmed down the sides and at the bottom, and fastened by a tape round the neck,—one of the many instances of the ridiculous practice of tampering with ancient fashions, which, if worth preserving, should be retained in their integrity, or if not, discarded altogether." But the ecclesiastical archæologists are too stiff-necked to be stalled off in this common-sense, offhand, and self-complacent manner, or to have their most cherished opinions bandied about after this style. It is therefore better to attempt the solution of this curious problem in evolution from both the ecclesiastical and secular sides, using as the basis of our method, sculptures, mosaics, and pictures. To begin with the ecclesiastical derivation, it is pointed out that the Levitical priesthood wore bands,—if not round the neck, at least round the waist! In many antique sculptures, the sacrificial priests are depicted with a band over the left shoulder and under the right arm, and connected in some way with the toga. This band seems to have been called an *orarium*. Others, again, have the *planeta* ornamented with *clavi*,—bands which crossed the shoulders something like modern braces, and upheld the toga, evidently to secure freedom of movement while on duty at the sacrificial altar. The next development of the *orarium* and the *clavus* was carrying the bands over each shoulder and uniting them in front,—the single band depending to the hem of the toga or robe,—and thus presenting the outline of a letter Y. This form is observable in a mosaic of Justinian and his court at Ravenna in 540. At the hands of the Byzantine priesthood, the *clavi* developed into the double band, which they called the *Epiteachelion*, and from that came by a process of ecclesiastical growth the stole of the Roman and the Anglican priesthood. There is, by the way, a mosaic in the Church of St. George at Thessalonica, which has been examined by the writer. This fine mosaic, formerly white-washed by the Turks, and on that account for centuries unknown, is ascribed to Constantine during his first sojourn at Thessalonica. It represents St. Eucarpion, soldier and martyr, with a broad collar coming down over the robe. The collar is bi-coloured—red on a white ground,—and the divisions give the white ground the appearance of incipient bands of the modern type. The *bonnets-à-oreilles* of the ninth and tenth centuries may have been a distinct variation of the stole bands, but undoubtedly from the

latter came what in the Middle Ages was called the Apparel of the Amice,—of which that possessed by Thomas à Becket is the type. "The amice," says Shaw, in his *Dress and Decorations of the Middle Ages*, "was a piece of fine linen in form of an oblong square, suspended over the shoulders. It was introduced in the eighth century to cover the neck, which was previously bare. The 'apparel' is the embroidered part of the amice, which is usually fastened to it in such a manner as to serve as a kind of collar. By the strings attached to the apparel, it would appear that it was tied round the neck after all the other vestments had been put on." Here endeth the ecclesiastical development, since it is easily seen that the bands of the French abbés, first introduced in the end of the seventeenth century, are but variations adapted by modern requirements from the "Apparel of the Amice."

The secular evolution of bands practically begins only where the ecclesiastic finds them fully blown. The Norman knights in the Middle Ages invented a chain collar, which depended from the helmet, and protected the neck. In 1350 we see a cowl connecting with the doublet by means of a white collar cut in front into a species of bands. Later in the same century the cowl disappears, and the neck is adorned with a small ruff. There is a picture of date 1458, showing the Scottish guard dispersing a crowd in Paris, and the men wear a turned-down collar. From this date onwards till about 1600, the neck adornment was successively a plain white frill, a piped ruff, which became deeper till it rose as high as the ears, sometimes as a single plaited collar, and anon as a heap of frills one above the other. With the growth of Puritanism in England, these furbelows sobered down into a plain white collar falling over the shoulders, and tied in front with little tassels. Gradually the Puritans made their collars narrower, and the tassels gave place to an elongation of the collar in front of the neck. It was at this point of time that Geneva bands arose. The satirical cavalier poet sings of the Sunday Levite's "little bands stiff starch'd;" while Hudibras speaks of—

"The handkerchief about the neck—
Canonical cravat of Smec,
From whom the institution came,
When church and state they set on flame;
And worn by them as badges then
Of spiritual warfaring men."

A footnote to this passage in Hudibras says:—"Smectymnus was a club of five Parliamentary holders-forth, the characters of whose names and talents were by themselves expressed in that senseless and insignificant word. They wore handkerchiefs about their necks for a note of distinction (as the officers of the Parliamentary army then did), which afterwards degenerated into carnal cravats." Then came the fashion of wearing the hair long, and subsequently the adoption of the enormous perruques or full-bottomed wigs;

which fell down the back and shoulders. Of course the cavaliers, who had always worn their collars broad-edged with lace, found these inconsistent with their new wigs. Hence, instead of collars, lace cravats, with long ends like bands, came to be used. Sometimes the cravat was manipulated into an imposing bow, not necessarily of the same colour as the bands, which generally were white. About 1720 we find the first open-breasted coat and an incipient ruffle, but it was not till fifty years later that ruffles in all their glory were the common breast and neck adornments of a gentleman. With the gradual disappearance of ruffles, except on state occasions, came the natural succession of the narrow band tied into bows and ends,—recognised as the ordinary white necktie of modern social life. Bands are only found now in the costume of Presbyterian ministers and professors, Anglican divines, certain Roman orders, English judges and barristers, Scottish judges, the Lord Advocate, Solicitor-General, and Dean of Faculty, and of afflicted relatives at country funerals!

Now what is the history of bands so far as the Scottish legal profession is concerned? The earliest portrait we have is Sir Thomas Hope in 1626, and he wears a broad falling-over collar of lace. Lord Chancellor Spottiswoode, who flourished in the middle of the seventeenth century, has a ruff round the neck; and so has the first Lord Napier, an Extraordinary Lord of Session. Sir George Mackenzie, Lord Advocate 1671–86, is represented with a cambric cravat, and Lord President Lockhart (1685–1688) with a cravat and bands. The picture of the funeral of Lord Chancellor Rothes in 1681, shows that every class in the community—bishops, barons, Lords of Session, advocates, Clerks of Session, Writers to the Signet, professors, magistrates, macers, heralds, trumpeters, coachmen, etc.—then wore cravats with bows and bands. The only distinction that seems to have existed between any class, is that the bishops' bands don't appear so long as any others. Every judge of whom we have a portrait in his official robes since that date, is represented as wearing bands of some kind or another,—short or long,—the ends simply of a voluminous cambric cravat or the more artificial smoothed-out fine linen band. The rule admits of two exceptions. Lord President Campbell (1789–1808) has no bands,—simply a white neckerchief,—and Lord President Inglis has the courtly ruffle. From what has been said, it may be inferred that the members of the Scottish bar adopted bands, not as a special part of their professional costume, but in obedience to custom common to all ranks and classes. Certain it is that in 1681 they wore bands, and that between that period and 1766, the bands, probably at the behest of fashion, gave place to white neckerchiefs or cravats of cambric. We fix on 1766, for on the 19th June of that year the following sentences appear in the Faculty minutes:—"That for the more decent habite and apparel of the advocates, and to distinguish them from others who wear

either the same apparel or very little different from it, that it should be resolved that the advocates shall wear bands as a part of their formalities; that the Dean and his Council shall wait on the Lord President, and lay before his Lordship this motion, and pray his Lordship's and the Court's approbation. The Faculty delayed the consideration of this affair till some other meeting." Had some sensitive soul been mistaken for a macer, and sought surcease of his sorrow in bands not of gay music, but of limp muslin? If so, his wounded feelings must have been assuaged, for the "affair" never came before another meeting of the Faculty, until raised a century and a quarter later, on the initiative of Mr. R. Vary Campbell. By the admirers of the bands, much dependence is placed on the authority of Vice-Dean Crosbie's picture, which dates between the meeting of the Faculty in 1766 and the end of the century. He is represented as wearing bands. It is suggested that the picture was painted in London, and that the artist simply attached to the Vice-Dean's cravat the bands which he observed the English barristers wear in the courts at Westminster. But we think there is a more probable explanation than this. The bulk of Crosbie's practice was in the General Assembly; his favourite society was that of clerics; and he may have adopted the bands in sitting for his portrait, if not also in the court—supposing he really wore them in court,—from his ecclesiastical leanings, sympathies, and professional connection. Be this as it may, as one swallow does not make a summer, so one set of bands could not make a general custom. Under any circumstances, bands have not been worn by advocates in the Scottish courts any time during the last century. Lord Cockburn in his *Memorials* gives a graphic description of a senator in 1805. Lord Hermand appeared in the General Assembly in the celebrated trial of Professor Leslie for heresy, contained in his famous "Treatise on Heat." Hermand was on the side of the heresy-hunters. "What a figure! as he stood on the floor declaiming and screaming amidst the divines,—the tall man, with his thin powdered locks and long pig-tail, the long Court of Session cravat flaccid and streaming with the heat, and the obtrusive linen!" "Sir," said Hermand, "I sucked in the being and attributes of God with my mother's milk." "A sceptic, sir, I hate! With my whole heart I detest him! But, Moderator, I love a Turk!" That which succeeded the cravat was the ruffle on neck and breast, with corresponding folds of puckered cambric or lace at the wrists. These ruffles were common down to 1840 or so, and when they were cast aside as too antiquated, the white necktie and plain collar took their place. Ruffles are now only occasionally seen on very special occasions, such as the presentation of a commission to the court or the like.

Our task is done. We have succeeded in showing that legal costume in Scotland, as in other countries, has not conformed to one unalterable pattern. It has varied in some of its features

with the fashion of the day ; changes have often been the result of caprice, sometimes of a pleasantry, but they have always been adopted by the general body of the bar gradually. To urge a return to the use of bands, on the ground that "bands form part of the advocates' uniform," is a somewhat loose plea. Why not cravats, or ruffles, or hats ? These all have been anciently worn as part of the uniform. But to press the question of uniform is to shear the bar of its wigs and bands and white ties, and what not else beside ; for the only uniform prescribed by statutory authority—and it is on that alone that the members of the bar are *entitled* to wear any distinctive dress—is a black gown lined with furring. Would the advocates of the uniform theory care to tear from court to court and from bar to bar in a fur-lined cloth gown ? Again, some consideration ought to be had for the Lords of Session, because, if we are to revert to the practice enjoined by James VI., then the grave and reverend seigneurs our learned lords must wear their purple and crimson robes on the streets during the sittings of the court ! This might lead to a repetition of the experience of Lord Coalstoun,—mirth-provoking to the onlookers, but certainly discomposing to the dignified representative of the majesty of the law. It is related that one day, when that learned judge was chatting with a friend, leaning out of the window of his house in Byer's Close, preparatory to wending his way up the High Street, Parliament House-wards, fully robed and bewigged, his perruque suddenly took an upward flight. Two young ladies, in a spirit of wicked gaiety, had slung a lively kitten attached to a long string out of one of the lofty windows of the High Street. Of course the kitten sprawled and clawed, and my Lord Coalstoun happening to pass at the moment, his wig was hooked. Up went the kitten with Coalstoun's perruque in its fond embrace, and there likewise floated skyward the not too dulcet-pitched prayers of the irate judge for the eternal welfare of maids and kitten. A return to the ancient custom might lend additional picturesqueness to the thoroughfares of both the New and Old Towns, but we are afraid that instead of impressing and overawing the lieges, it would only afford fun to the street gamins, and excite a vulgar and rude curiosity on the part of strangers.

There appear to be no great or commanding reasons for a departure from the present costume. It is quaint, convenient, comfortable, and seemly. If the wig were cast aside, as in Germany, France, Holland, and the United States, a skull-cap would have to be worn, like the high black cap of the French bar, as a healthful protection in the draughty corridors and more tempestuous Hall. The gown is simple, not ungraceful and sufficiently representative of the garb ordered by James VI. If we have a suggestion to offer, it is that all the Clerks of Session, depute or interim, and all the clerks to the Lords Ordinary, should wear gowns, as it evidently was intended by James VI. that every such official should be duly togated.

FIFTEENTH REPORT ON THE JUDICIAL STATISTICS OF SCOTLAND, BEING FOR THE YEAR 1882.

THE next division is entitled "Prisons and Prisoners, Digest of Returns," collected under the provisions of the Prisons (Scotland) Act, 1877, for the year ended 1882.

The collection and publication of "Judicial Statistics of Scotland" are committed to the Prison Commissioners. This Commission issue a report for the *special* business entrusted to them. We are humbly of opinion that this report ought to embrace all matters of "prisons and prisoners." The periods may be somewhat different, but this only leads to confusion. If police details were left to the report of the inspector of police, and all matters of criminals and prisons were fully detailed in the report of the Prison Commissioners, there would then be found ample space in these separate reports, and the report on judicial statistics would then be limited to the proceedings in courts of law, civil and criminal, and would thus present a more comprehensive and satisfactory exhibition of all *judicial* procedure, without interruption of matters which are merely *executive*, and not judicial.

The first table under this branch gives the average "daily number of criminal and civil prisoners in the several prisons in Scotland, from the year 1840 to the year 1882 inclusive." We abridge this table into decennial periods, adding the year 1882 :—

	Criminal.		Civil.	
	Male.	Female.	Male.	Female.
1840,	1264	678	98	10
1850,	1974	1016	68	1
1860,	1044	1057	62	2
1870,	1646	1096	80	3
1880,	1940	1037	90	6
1882,	1761	811	13	0

A second table repeats what was already given under previous tables, though under different periods, from 30th June 1861 to 31st December 1882. We can scarcely perceive, with the variation of periods, how by any possibility can be given quinquennial *yearly* numbers. The table proceeds to give—(1) the number of prisoners received in the year; (2) deduct received by transference or removal from one prison to another, making the net number of commitments—1861, 18,575; 1866, 23,423; 1871, 27,156; 1876, 37,586; 1881, 47,705; (3) the ages of prisoners under 16 years until 50, and above; (4) persons sentenced to imprisonment for definite and indefinite periods; (5) sentences of transportation; (6) to penal servitude and by military courts; (7) previous imprisonments in the *same* prison, and state of instruction (education) of criminal prisoners on admission, and the numbers who "had learned more" than mere reading and writing; but the report does not state whether this was on admission or discharge.

The next tables are those of finance, the first being a comparative table of the expenditure for prisons in Scotland, and the average annual cost per prisoner. The cost is placed under thirteen heads, and for five years ended in 1882, divided each year between the General Prison at Perth and county prisons. There is also appended the "*labour department*." All these important details ought to have been given in the second report of the Commissioners of Prisons, and thus brought under the immediate notice of those in charge of that department, in place of being intermingled with the judicial procedure of courts of law. As to the important item of net annual cost per prisoner, it is made to appear that the quinquennial yearly average for the years before mentioned states the annual cost per annum in the General Prison at Perth as at £21, 10s. 7d., and in the county prisons, £20, 11s. 1d. A table sets forth the income and expenditure of funds administered by the Prison Commissioners for the five years ended in 1882. There appears to be in all thirty criminal prisons in Scotland, including two general prisons, one at Perth, and another, recently opened, at Barlinnie, Glasgow. But as the Commissioners can dispose of prisoners to any prison, and the above-named two prisons now receive prisoners for short periods, they cease to be properly *general* prisons. There are 27 prisons which receive civil prisoners as now modified. There are 7 police cells licensed under the Summary Procedure Act, 1864, for detention not exceeding three days. There are 12 police cells licensed under the Act 1877 for detention not longer than fourteen days. A variety of tables distribute the minute particulars of the prisons among the 25 county prisons and the 12 police cells licensed under the Act 1877. There was no escape from prisons during the year 1882, but three suicides—one in the General Prison, a second in the prison of Aberdeen, and the third in that of Stirling. The details of prisons and prisoners, of such minute character, occupy fourteen pages of the judicial returns, which, we again repeat, ought to have been given in the Report of the Commissioners of Prisons already published, so far as such are of really practical utility, much of which we greatly doubt, although the trouble and care of collecting, tabulating, and publishing them must greatly exceed their value.

The report now enters on what is properly *judicial* statistics, or matters which require a Court of Justice and the presence of a judge, with the necessary legal officers for the administration of the law, civil and criminal. The tables properly commence with the Outer House of the Court of Session, and consist of retrospective tables—1st, "a comparative table of the business in the Outer House of the Court of Session for five years ending in 1882." The following is an abridgment of this table. We here omit cases transferred from one Lord Ordinary to another, whether the process was "initiated by summons or

petition, or in any other mode," and whether "judgment was given with or without a closed record," these points being of no practical importance.

	1878.	1879.	1880.	1881.	1882.
Causes initiated within the year, . . .	1618	1541	1586	1590	1588
Total in dependence, . . .	2448	2366	2279	2360	2228

Note.—It is not easy to perceive how cases transferred from one Lord Ordinary to another can form a deduction from "causes before the Court." It is surprising to observe the variation in the number of these transferences. In 1878 there was only 1, but in 1881 they increased to no less than 111.

There were disposed by final judgments in addition to causes taken out of Court and those left in dependence at the close of the year, . . .					
	1174	1160	1110	1263	1215
Of final judgments by the Court there were—					
„ For pursuer, . . .	921	882	850	975	923
„ For defender, . . .	239	230	240	260	287
„ Mixed judgments, . . .	24	48	20	28	5
Final judgments on verdicts, . . .	8	1	11	15	26
„ For pursuer, . . .	7	1	7	8	20
„ For defender, . . .	1	0	4	7	6
„ Mixed verdicts, . . .	...	...	...	...	...

A second table details the business in the Inner House of the Court of Session (but it does not distinguish between the two Divisions) for the *five* years above noted:—

	1878.	1879.	1880.	1881.	1882.
Number of causes in dependence, including those received from previous year, . . .	1072	1153	843	845	883
Final judgments given within the year, . . .	586	854	590	576	640
Causes left in dependence, . . .	384	152	184	174	170
Judgments on reclaiming notes, . . .	195	208	176	189	203
Judgments for pursuer, . . .	341	476	362	347	405
Judgments for defender, . . .	191	335	187	200	210
Mixed judgments, . . .	54	43	41	29	25
Final judgments on verdicts by juries, . . .	12	3	2	9	3
„ For pursuers, . . .	9	0	2	5	1
„ For defenders, . . .	3	3	0	4	2
„ Mixed verdicts, . . .	...	...	...	...	...
Judgments on reclaiming notes from Outer House—					
Adhered to, . . .	128	138	112	123	128
Repeated, but on altered grounds of decision, . . .	7	8	5	1	3
Reversed, . . .	16	18	12	13	17
Partially adhered to and partially reversed, . . .	43	43	48	49	53

The next, or third, table is called "Proceedings in the Court of each Lord Ordinary for Year 1881." There is the heading "General Balance;" but the meaning of this is not of very easy ascertainment, since there are no figures to balance. One remarkable circumstance occurs—that whilst the Court of each Lord

Ordinary is promised in the heading, the name of not one of their Lordships is given, and the judge can only be guessed by the interpretation of the "office mark of Court," which consists of four couples of cabalistic letters, and none but the initiated can solve or attach them to any of the five Lords Ordinary. The table shows that 644 causes were in dependence during the year 1882. Throughout the tables particular notice is taken whether the cause has been initiated by summons, or petition, or in any other way; or whether a cause has been transferred from one Court to another (meaning from one judge or Lord Ordinary to another)—the practical benefit of all which knowledge is wholly useless. The most aged cause still remaining in the cold climate of the Outer House beating at the gates of Justice for redress dates from the 1st June 1848, being thus in a state of transition for thirty-three years. This can scarcely be called a "*ganging* plea." It has attached itself to the office marked I. S. It is remarkable the distribution among these "office marks;" whilst the M. D. office has 194 causes, R. J. has only 45. An inquiry may competently be asked whether this result is in consequence of the excellence of the judge or the civility of the clerk. A table states that there were 1215 judgments given within the year, and 278 causes taken out of Court without a final judgment. The anxiety of the compiler to give every detail, however minute, has led him to give spaces for so many years without any figures. Thus one table with 20 columns, and another with 12, have 10 columns in the first left wholly void, and 8 in the second. This extravagant mode is generally adopted throughout; thus a table gives final judgments within the year, and initiated in each year, beginning with the oldest. This judicial net is spread into 12 columns or meshes, but 8 of which have been unsuccessful in obtaining figures, though the column extends from 1868. The oldest litigation in the series was initiated in 1879. Two causes are said to have been then born simultaneously. Of final judgments 1215 were given, of which 1189 were by the Lords Ordinary, and only 26 on verdicts. In these jury causes there were 11 initiated in the year 1881, but as usual 3 previous columns are given, but without any figures therein. There appear other details of little or no importance—such as "number of interlocutors before final judgment," "number of *pleadings* and *other documents* exclusive of *productions*," and distinguishing whether before or after verdict (although the latter, as may be supposed, has a "negative quantity"), the number of causes in which there was or was not a closed record, and the number of interlocutors pronounced before and after closing the record. All these details must have occasioned much trouble without any availing benefit. A tell-tale or inquisitorial table proposes to give the "number of weeks between closing record and pronouncing judgment," but it does not attempt to affix the delay to the judge or party, and if the former, who is the

lordly delinquent, the table extends from 1 week to "above 200 weeks." Judgment appears to have been given in 18 cases within 1 week, with varied numbers occurring in the subsequent "course of time." One only took upwards of 150 and under 200 weeks, or 3 years, to hatch to maturity, whilst none appear in the final latitude of above 200 weeks.

A table purposes to give "Analysis of final judgments in processes initiated by petition or writ other than summons during session." Of these nondescripts there were 165 in which no appearance was entered, of which 164 were granted and 1 refused, and none entered in the neutral column. In 32 cases where opposition was entered, 12 were granted and 16 refused, and 4 are entered in the column of "otherwise." The next three tables form statistical curiosities. They are intended to give the number of cases disposed of after reports by "men of business," "accountant of Court," "other accountants," and whether "reported to Inner House by interlocutor and note or verbally, and to which Division reported." Another table is a "general balance," without any sum wherewith to balance. Another table intends to give the details of "Petitions before the Junior Lord Ordinary," with 14 prepared niches for all the numbers and details of their disposal, from the year 1852 to 1881 inclusive. It will be astonishing to learn that these columnar tables are all left blank, or, as it is said in shipping practice, the details are entitled to a "clean bill." Table IV., occupying folio page 77, might have been omitted, and the answer to the heading been satisfactorily answered by the simple words, "There were no such petitions," and therefore no call for details. There is, however, the significant note attached to this vacuum, "No return by Clerk of Court." So it remains untold whether there was no business in this department, or no return of the business made by Clerk of Court.

Not satisfied with the preceding blank tables, 3 more are still in the same happy, or unhappy state. Folio 78 has 3 separate cellular accommodation for figures for reception of final judgments in processes initiated by petition; but as there appears to have been none, the cells remain wholly untenanted, and certainly the loss sustained by their want can scarcely be appreciable. A table is said to detail proceedings in *each* Division of the Inner House. Three tables are given, but we cannot find the Division in which the proceedings took place. From the first table we learn that 174 cases were returned last year as in dependence, the oldest on the roll having been in existence since 24th April 1878 (it is supposed from its first appearance in any department of the Court). A second table is blank, as no cause had been transferred from one Court (Division?) to another. A third table reports that 812 causes were initiated in one mode or another,—278 of these being appeals,—and after deducting 103 causes transferred from one Division to the other, from the total causes before the Court (986),

there remained 883. A table sets forth, of the 640 final judgments, how the question of costs was adjudged, whether with or without costs, or from "a common fund," or "otherwise" disposed of. The verdicts of jury are stated in a table amounting to only 3, whereof 1 was a verdict for pursuer and 2 for defender. Another table sets forth number of pleadings in jury cases, which is of no importance. A brief table reports the "total number of causes or proceedings brought from Outer House, and to which Division (but which Division is not named, and where the Inner House) pronounced judgment on decisions of Lord Ordinary." There is some difficulty in following the figures in this table, but it would appear that 201 judgments were thus given, 128 of which were affirming the decision of the Lord Ordinary; 3 affirmed, but on different grounds; 53 reversed; and 17 "partially adhered to and partially altered."

Another very interesting table records the decisions by each Lord Ordinary appealed to the Inner House and their fate (the Division is not given). It thus appears that Lords Shand and Curriehill had each one judgment affirmed. Lord Rutherford Clark had 11 judgments affirmed *simpliciter*, 5 reversed, and 3 partially reversed. Lord Adam had 23 judgments affirmed *simpliciter*, 9 reversed, and 6 partially affirmed. Lord Lee had 16 judgments affirmed *simpliciter*, 1 affirmed on different grounds, 11 reversed, and 5 partially dealt with. Lord Fraser had 34 judgments affirmed *simpliciter*, 12 reversed, and 1 partially dealt with. Lord M'Laren had 18 judgments affirmed *simpliciter*, 2 on different grounds, 12 reversed, and 2 partially dealt with. Lord Kinnear had 24 judgments affirmed *simpliciter*, and 4 reversed. The Lord Ordinary on the Bills appears to have had no appeals, although a catacomb is provided for them. According to this mode of disclosing the absence of causes, niches are provided for causes decided under sections 59 and 60 of the Court of Session Act, 1868, and election petitions. But all the spaces left for the reception of numbers are of course left void, there being none to occupy them. There were 9 appeal cases under the Registration Act, but the results of these cases are not given; also 6 applications for the poor's roll of the First Division at the beginning of the year, and 1 put on during the year, 1 removed by final judgment, and 6 otherwise removed. As to the Second Division, 26 were admitted to sue *in forma pauperis*, but all other particulars applicable to the Second Division are met with the significant response of "no record" and "not known." So far as the table shows, 33 were in the possession of the privilege, but 7 had been removed. This concludes the statistics of the Supreme Court, both in the Outer and Inner Divisions.

The judicial statistics now reach the Sheriff's Ordinary Court. They commence with "*retrospective tables*." The *first* is a comparative table of the business in the Sheriffs' Ordinary Courts in the years 1878, 1879, 1880, 1881, 1882:—

	1878.	1879.	1880.	1881.	1882.
1. Total causes in dependence in the year, with those from previous years, (All the cases were initiated by petitions, now the only recognised mode of initiation, though provision is made in the report for other modes.)	10,234	11,258	10,568	10,076	9772
2. Total judgments within the year (after deducting causes taken out of Court and left in dependence),	7759	8580	7856	7453	7441
3. Decrees in absence,	4280	5070	4495	4097	4040
Decrees <i>in foro</i> ,	3479	3510	3361	3356	3401
4. Judgments <i>in foro</i> —					
By Sheriff,	46	51	38	31	37
Do. on appeal,	1186	1126	951	941	926
By Sheriff-Substitute,	2248	2338	2372	2364	2436
5. Result of Appeals—					
1. Sustained (that is, appeal <i>not</i> sustained but judgment affirmed),	919	841	722	734	744
2. Reversed,	162	158	141	132	119
3. Mixed judgments,	104	127	88	75	63
6. Costs. — Sum-total entered in process (but it is not said how disposed of between parties, as is done in the statistics of Court of Session — parts of pounds here left). It would have been a much more important subject, and more easy of measurement, to have the knowledge of the amount involved in the causes than the mere amount of costs,	£23,737	£25,826	£25,634	£26,863	£27,633

MISCELLANEOUS AND ADMINISTRATIVE BUSINESS.

	1878.	1879.	1880.	1881.	1882.
Applications, etc., under—					
1. Bankrupt Act,	4184	5666	3631	2581	2155
2. Poor-Law Acts,	843	800	806	601	644
3. Lunacy Acts,	2282	2223	2414	2684	2390
4. Register of Births, etc.,	795	775	772	846	902
5. Education Act, 1872,	554	468	668	690	660
6. For admission, etc., of sheriff-officers,	40	64	70	41	35
7. For service of heirs,	575	551	533	532	540
8. For appointment of tutors or curators to minors,	36	40	27	25	36
9. For aliment of civil prisoners,	137	143	139	34	20
10. Under Sanitary Act,	84	57	82	74	63
11. Merchant Shipping Act,	42	27	29	28	33
12. For imprisonment under Civil Imprisonment Act, 1882, . . . .	...	...	...	...	109
13. For <i>fuga</i> warrants,	84	104	92	100	76
14. For Lawburrows,	12	27	13	12	14
15. For admission to Poor's Roll,	1625	1859	1754	1792	1714
16. Decree in absence from Ordinary Court (?),*	4280	5070	4495	4097	4040
17. Miscellaneous applications (?). . . .	1988	2318	2533	2212	2119
Total,	17,561	20,192	18,058	16,249	15,550

* Note.—It is not easy to perceive how “Decrees in absence from (? in) the Ordinary Court” can be reckoned “Miscellaneous and Administrative Business,” seeing that the same figures here repeated appear already as “Decrees in absence” in a previous part of the same table.

	1878.	1879.	1880.	1881.	1882.
Applications for <i>cessio bonorum</i>, . . .	...	...	...	...	...
Number of applications, with number in dependence at com- mencement, . . .	442	530	469	339	553
1. Disposed of by decree for pursuer, . . .	292	337	305	179	317
2. Otherwise removed out of Court, . . .	83	118	141	115	185
3. In dependence at end of year, . . .	67	75	23	45	51

(To be continued.)

NOTES IN THE INNER HOUSE.

In our last Notes we mentioned the case of *Skinner and Others* (First Division) as seeming to settle the question of the efficacy of an unsigned testamentary writing. That case appeared to decide that no effect could be given to such a document. But within a very short period the question has been raised again in the Second Division of the Court of Session, and an unsigned holograph testament has, by the judges sitting there, been accepted as the last will of the writer. The peculiar circumstances, however, in this later case are sufficient to prevent it being quoted as a decision conflicting with that of *Skinner*. In *Skinner's* case the document was found in the repositories of the deceased. It could not therefore be distinguished from the earlier case of *Dunlop*, the true principle of which, according to Lord Shand, was "that enunciated by Lord Stair, namely, that where a holograph testamentary deed found in the repositories of the deceased is unsigned, it is to be held as an incomplete act from which the party has resiled." But in *Russell's Trustees*, December 11, 1883 (Second Division), the document, in a sealed up packet, was handed by the deceased to the party whose address the cover bore. He was told by her that it contained her will, and was not to be opened until after her death. A letter having reference to it was attached by a string to this packet. This letter was signed by the Christian name of the deceased. Now it was impossible for the Court to hold in these circumstances that a document so made up, identified, and delivered was merely a draft, or to refuse effect to it unless it could be shown that by our law an unsigned holograph is in every case absolutely worthless. Lord Craighill put it well when he said: "Were subscription to a holograph will necessary as a solemnity in execution, the will in question behaved to be held ineffectual, because it has not been subscribed. But I consider the weight of authority inclines to the view that subscription is required, not to supply a solemnity, but to afford evidence or authentications of final resolution, in room of which, if the testator has not subscribed, exclusive proof may competently be adduced." Lord Young said: "I think the law is accurately stated by Lord Stair in the passage which Lord Craig-

hill has referred to. Holograph writs subscribed are unquestionably the strongest probation by writ and least imitable. But if they be not subscribed, they are understood to be incomplete acts from which the party has resiled. I think the word 'understood' is as accurate a word as could have been used by Lord Stair to express his meaning, which is not that there is any rule *positivi juris* requiring subscription as essential, but merely that it is a reasonable conclusion, and one on which a Court would determine, that if the writ be not described, it is incomplete, and was not intended by the writer to be complete."

In the case of *Main and Others v. Storrar*, November 16, 1883. (First Division), we observe that although the Inner House held that the proof taken before the Lord Ordinary ought to have been limited to the defender's writ or oath, nevertheless they insisted upon looking into the evidence led *prouit de jure*. "I quite agree," says Lord Mure, "with what your Lordship has said as to the nature of the proof which should have taken place in this case. As, however, a proof at large has been allowed without objection, apparently having been taken on either side, we must look at the proof so led."

Abel v. Watt, November 21, 1883 (First Division), raises an important point of bankruptcy law. The 103rd section of the Act of 1856 provides for the case of property coming into the possession of the bankrupt at any time before he obtains his discharge; such estate is declared to fall *ipso jure* under the sequestration, and by an application to Court the trustee is enabled to receive it for the creditors. Now, in this case the bankrupt had been sequestrated in 1863, and his trustee was discharged in 1870. He then went into business again, got again into difficulties, and was compelled in 1883 to grant a disposition *omnium bonorum* in favour of a new set of creditors. Having acquired property, one of his original creditors sought to have the 103rd section put in force by the appointment of a new trustee under the sequestration. This was opposed by the party acting in that capacity under the cessio. The Court sustained the plea that the old creditors were barred by acquiescence. The Lord President, while admitting that the right conferred by the 103rd section is unqualified, quoted from his opinion in the case of *Taylor v. Charteris and Andrew*, 7 Ret. 128, to this effect: "No doubt, if, after his (the trustee's) discharge, the creditors showed no disposition to avail themselves of their rights, and had allowed the bankrupt to keep possession of the estate and deal with it as he pleased, there might in these circumstances, and by lapse of time, have been a bar to their title. So, again, it has been assumed in the decided cases on this matter, that if the creditors allow the bankrupt to embark anew in trade, and to acquire a business stock on the footing that he is entitled to enter the market and trade as if *sui juris*, then they may not be entitled to prevent new creditors from ranking on the newly

acquired estate." In *Taylor's* case both the trustee and the bankrupt had been discharged; the estate which the latter had acquired prior to his discharge was held to belong to his creditors under the 103rd section. In that case, however, there was no conflict between two sets of trade creditors as in *Abel's*.

In *Nelmes and Co. v. Ewing*, Nov. 23, 1883 (First Division), a question was raised relating to the law of hypothec. A certain billiard-room had been furnished by means of articles obtained at a weekly rent. The hirer falling into arrears, these were removed by the party furnishing them. The landlord of the property used sequestration, and obtained a warrant for their restoration. The Court sustained the landlord's right to recover and sell them for rent. The Lord President admitted that a good deal might be said against the view that a landlord's hypothec applied to articles of furniture "let on hire for a limited time and for a definite purpose." But he held that when the articles comprehended the whole furnishings of a room intended to be used for years, the mere fact that a weekly sum was paid for their hire could not defeat the landlord's hypothec. Lord Deas said: "I am more than ever satisfied that it is not safe to decide any of these questions relating to the landlord's hypothec on the general rule, that what is brought into the house of another always becomes liable to the hypothec. In many cases the application of the rule would be quite unjust and unreasonable."

In the case of *Lochhead v. Graham*, Nov. 28, 1883 (Second Division), the Court had to consider the construction to be put upon the recent Citation Amendment Act. Under section 3 of that Act it is provided, "any summons or warrant of citation of a person, whether as a party or witness, or warrant of service or judicial intimation," may be executed by means of registered post letter. The question was, Does this section apply to a warrant of sale under a poinding, seeing that by the Personal Diligence Act such a warrant is directed to be served? The Lord Ordinary (Kinnear) held that it did not. His judgment was, however, reversed in the Inner House. Lord Young, who delivered the opinion of the Court, said: "My own opinion is that the recent statute is applicable here. I think it is both in language and reason applicable to judicial intimations of this kind as well as to citations. I cannot conceive a case in which its provisions might more appropriately be resorted to than the present, where the party, for the sale of whose goods a warrant has been applied for in Peebles, is resident in Edinburgh." It was also held that in the case of a poinding, it is no objection that the goods to be poinded are in possession of the creditor himself. "A creditor," says the Lord Ordinary, "cannot arrest in his own hands (apart from recent statute), because arrestment is a diligence *in personam* and operates as a restraint upon third parties, who are prohibited from performing the obligation in favour of the debtor until the right of the

existing creditor shall be satisfied. But poiding is *in rem*, and if the poided goods are the property, the fact of their being in the creditor's possession does not appear to create any obstacle to their being poided."

In *Fleming v. Yeaman*, Dec. 1, 1883 (First Division), it was held that although a creditor had agreed that certain I O U's were to be vouchers for an account current, and that he was not to sue the debtor or do diligence against him by founding upon these documents, the creditor was nevertheless entitled to use them for the purpose of obtaining his debtor's sequestration. Further, that an appeal to the House of Lords could not affect the question of notour bankruptcy, founded upon an expired charge following a Court of Session decree.

In *Manson's Trustees v. Forsyth*, Dec. 1, 1883 (Second Division), it was decided that an interlocutor of the Sheriff-Substitute granting interim interdict upon caution being found, could not competently be appealed to the Court of Session.

The first decision under the 6th section of the Bankruptcy and Cessio Act, 1881, was given in the case of *Clarke*, Dec. 8, 1882 (First Division). That section provides that a bankrupt who has not paid a dividend of five shillings in the pound, or found security for paying it, is not to receive his discharge unless the judge is satisfied that his failure to pay has not arisen from his own fault. In this case there was only the bankrupt's unsupported statement of his inability to do more than he had done for his creditors, and it appeared that he had engaged in reckless trading. Therefore the Court held that he had not discharged the onus upon him, and refused a discharge.

We note two poor law cases. In *Milne v. Ross*, Dec. 11, 1883 (Second Division), the Court affirmed the principle laid down in *Milne v. Henderson and Smith*, 7 Ret. 317, and held that a son who by reason of mental or bodily infirmity could not acquire a settlement of his own, and who was unforsfamiliariated, took the settlement of his father, so that if the father's settlement changed, his former parish was freed from the obligation to afford relief to the son. Sheriff Guthrie Smith had held that in respect of his infirmity the son had become a pauper in his own right, and that his claim for relief against the original parish was not affected by the fact of his father, with whom he lived, having lost a settlement there and acquired one elsewhere. In *Beattie and Muir v. Brown*, Dec. 11, 1883 (Second Division), it was decided that the desertion of a wife by her husband, in so far as it affected her acquisition of a settlement, was not interrupted by the fact that, unknown to the parochial authorities, he had returned and lived with her for the period of two months. It was also held in this case that in a question between two parishes, an admission of liability made by one of them, not to the other, but to a third parish, will not prejudice it.

Correspondence.

(To the Editor of the Journal of Jurisprudence.)

SIR,—I have read with some interest the article in your January number upon "A Chance for the Bar." As a solicitor practising in the Supreme Court, I have had ample opportunity of observing the working of the Law Agents Act, and I am fully satisfied your observations as to the effect of that Act upon the quality of agents are quite within the mark. So long as the Writers to the Signet and Solicitors before the Supreme Court had the right of admitting to practise, a wholesome check was exercised by these bodies upon their members, while those members were careful to avoid any unprofessional conduct which would bring upon them the censure of the body to which they belonged. But now the numerous law agents who are admitted to practise are not answerable to any one but the Court, and every one knows how very flagrant must be the conduct of any practitioner before it comes under the cognizance of the Court. But there is a provision in the Law Agents Act which, I think, more than any other, has served to lower the professional tone of solicitors. I refer to the enactment which allows town agents to share their fees with country agents. The proposal to which you allude as having been made by an agent to a counsel is an illustration of what is of very frequent occurrence between town and country agents. I know that in many cases country agents send their business to those agents in town who will give them the largest share of their fees. The consequence is that a client is auctioned by his agent in the country to the highest town bidder, in many cases regardless of the due protection of the client's interests. Recently a representation was made by the agents that the then existing table of fees was wholly inadequate. In consequence, a revision of the table took place, and the fees were increased. And yet many agents agree to do the work for one-half of these fees, the country agent, who does nothing, getting the other half. The result is, that if the town agent is to be suitably remunerated, he must make the account as large as possible, and the poor client is in the end made to pay for this double agency. I know of actual cases where town agents have called on country agents—sometimes utter strangers to them—and have offered to divide fees equally if the country agent would send all his business to them. A system which admits of such begging and bargaining as this cannot but degrade the profession. It is not to be wondered at that, when professional men are eager to undersell each other in this manner in order to get business, the tone of the profession should be lowered and the interests of clients suffer. The decrease of business in the Court

of Session, and the trifling character of many of the causes is, I fear, an indication that solicitors do not command the same confidence and respect which they formerly did.—I am, etc.,

PRACTITIONER.

EDINBURGH, February 1884.

[We hope that the new Incorporated Law Society will turn its attention to such matters.—ED. *J. of J.*]

Reviews.

Suicide: History of the Penal Laws relating to it in their Legal, Social, Moral, and Religious Aspects in Ancient and Modern Times. By R. S. GUERNSEY, of the New York Bar. New York: Strouse & Co. 1883.

THE title of this work is remarkably comprehensive—far more comprehensive than the work itself, notwithstanding the fact that it has been “revised and enlarged” so as now to extend to forty pages octavo. The book is extremely funny. It is rendered more than funny when we read in the introduction that “the author . . . believes that this work shows a thoroughness of research and detail which none of the many treatises on the subject of suicide has attained.” There is genuine humour in this. We question whether the author’s research has ventured far beyond the usual manuals of a school-boy. The “Bible, Josephus, and *Hamlet*” contribute largely. The entire book, as we have said, consists of only forty pages; but Mr. Guernsey does not grudge two of these to quoting the dialogue between the gravediggers in *Hamlet*, and another to discoursing on it, and to quoting Laertes’ unseemly squabble with the priest. If we except a quotation from Beccaria on “Crimes and their Punishments,” and a reference in the text to the title “Gehenna” in Chambers’s *Cyclopædia*, there is really little besides. The author gravely deals with the momentous question whether Samson’s death can “properly be called suicide.” There is throughout a lack of arrangement and division, which is as charmingly *naïve* as it is mercifully rare. Then, to an ordinary reader, one not behind the scenes, there appears to be no *prima facie* good reason why Mr. Guernsey should spell “testamentary” “testimentary,” and yet not give us anything new in the spelling of “testator.” We may notice that the *penal* laws mentioned against suicide are those referring to “the disposition of the body and property of the deceased in a manner which will deter others from similar acts,” and those bearing on the relation of suicide to life insurance.

The Law Agents Act, 1873: Its Operation and Results as affecting Legal Education in Scotland. By WILLIAM GEORGE BLACK, Writer, Vice-President of the Glasgow Juridical Society. Glasgow: James Maclehose & Sons.

THIS is a very readable booklet, consisting of three articles originally published in the *Glasgow Herald* under the title "Scottish Law Agents," and now revised and brought down to date, with the addition of two chapters on the future of legal education and graduation in law, and the letter on that latter subject addressed to this Journal by Mr. W. G. Miller in May 1882. The author's revision of the original part of his work has not been very thorough, several passages still exhibiting the looseness and inaccuracy generally characteristic of newspaper articles on legal subjects. For example, in the very first sentence—"Prior to 1873, the admission of law agents was regulated by the Procurators (Scotland) Act of 1865"—Mr. Black ignores the fact that the Act referred to did not affect the admission of law agents practising in the Court of Session or in several of the more important Sheriff Courts. Such inaccuracies, however, detract but little from the real merits of Mr. Black's work, which does not profess to be a legal treatise.

The second chapter contains a most graphic and amusing description of the scene presented by the Oddfellows' Hall in Edinburgh, when the Board of Examiners are there sitting in judgment on would-be law agents, who are all numbered like convicts, and ranged in rows of nine men each, law candidate and general knowledge candidate alternately, in sandwich style, so as to prevent, as far as possible, any unlawful seeking after information.

In preparing various statistical tables regarding applicants for examination since the passing of the Law Agents Act, Mr. Black has obviously taken great pains; and the results of his researches are not without interest. Among other things, these tables show that the numbers of those who apply for examination, and of those who succeed in passing, are increasing every year, but that only a small proportion of the candidates are graduates either in Arts or in Law. Under the present system, all graduates in law are admitted as law agents without being subjected to examination on any subject except forms of process; but Mr. Black strenuously contends that candidates holding the degree of LL.B. ought to be exempted from examination even on that subject. Under section 11 of the Procurators Act, such candidates were entitled to be admitted to practise in the Sheriff Courts without being subjected to any examination (a privilege of which only two persons ever took advantage); and Mr. Black, ignoring the fact that that section was absolutely repealed by the Act of 1873, seems occasionally to go so far as to maintain that Bachelors of Laws are still entitled as

a matter of right to be exempted from the obnoxious examination on forms of process. He is indignant that holders of the degree of LL.B. should in this respect be in no better position than holders of the humble degree of B.L., or even "the main body of undistinguished students." For our own part, however, we cannot think that Bachelors of Laws have any legitimate ground for complaint. As forms of process are not included in the curriculum for the degree, a Bachelor of Laws may be absolutely ignorant of the mode in which legal proceedings require to be conducted in this country. Surely the public are entitled to expect that every person admitted to the monopoly of Court practice shall have some knowledge of those forms of process on which the rights of the lieges frequently depend. It is no doubt true that a Bachelor of Laws may now be called to the Bar, without undergoing any examination; but young advocates seldom get work till they have become familiar with the practice of the Court; they are selected by (theoretically) discriminating law agents, and there is not much chance of their going wrong when properly instructed by law agents who know their own business. In any case, there is more to be said in favour of subjecting advocates to examination in Court practice than of exempting law agents from such examination. If "a shrewd man of business has been known to describe a graduate as a person generally unfit for business," there is all the more need for Bachelors of Laws to make themselves familiar with the technical part of their professional work, bearing in mind that their college career is only part of the requisite preparation for the real battle of life. We must confess, however, that, in our opinion, the Examiners do not at present put as many questions on forms of process as are necessary to afford a fair test of the knowledge of the candidates.

Mr. Black appears to believe that a legal millennium would arrive, if every candidate for admission as a law agent was obliged to graduate in law. As the world is at present constituted, however, we fear that this is only a devout imagination, the realization of which would involve either the lowering of the degree to the capacity of ordinary law students, or the artificial restriction of the number of persons qualified to practise as law agents. There is little to be gained in merely making the title "Bachelor of Law" equivalent to the title "Law Agent."

On another point we venture again to differ from Mr. Black. He objects to the regulation at present in force, exempting from examination in general knowledge those candidates who have attended in three separate sessions three separate classes in Arts in any Scottish University (one of such classes being Humanity), and have taken part in the class examinations. No doubt it is quite possible for a student to lounge through University classes without acquiring much real knowledge; but we are inclined to think that even three years of such lounging may have more

permanent educational effect than a few months' cram in the usual branches of school-boy learning. The question is, What shall be the minimum of general knowledge entitling a young man to pass as a law agent, and how shall the possession of that minimum be ascertained? To prescribe one uniform course of study, or to test every candidate's knowledge in the same way, does not appear to us to be either fair to the individual candidates or advantageous to the public. One may be, in the best sense of the expression, a well-educated man, and yet be utterly incapable of passing an examination in some uncongenial subject.

We have often had occasion to protest against the system of tacking on to law books an appendix of undigested and indigestible matter. We regret to see that more than one-third of Mr. Black's little book consists of such an appendix, containing the Law Agents Act of 1873 and relative Acts of Sederunt, without note or comment, and specimen examination papers, the same as those published in the last edition of Mr. Begg's treatise on Law Agents, but unrevised, one ancient question as to imprisonment for debt being still left to confound the reader. The regulations issued by the Board of Examiners are not included in this appendix, though they contain all the practical information that candidates require.

Taking it all in all, however, we have much pleasure in commending Mr. Black's little volume as a valuable addition to the literature regarding legal education in Scotland.

L'Arbre des Batailles. D'HONORÉ BONET, publié par ERNEST NYS, Juge au Tribunal de Première Instance d'Anvers, Associé et secrétaire adjoint de l'Institut de Droit International. London: Trübner. 1883.

THIS is a work of varied interest. To the literary antiquarian it affords a quaint exemplar of the learning of the fourteenth century; to the historian of mediæval Europe it gives precious hints of contemporaneous opinion on current events and valuable details of the ways and means of war; but it is to the student of Public International Law that the work presents its most important aspect; for it is a philosophical treatise on the Law of War, old-fashioned indeed, and sometimes curiously ingenuous, yet (when viewed in the light of the time in which it was written) sound in doctrine, subtle in argument, and logical in exposition. Of the many mediæval commentaries on the rights and duties of belligerents this one has perhaps the strongest title to dispute the often sustained claim of Grotius to be the father of the modern Law of Nations. It was written two hundred years before the birth of the Dutch "monster of erudition;" and although the *Prolegomena* to

the *De Jure Belli ac Pacis* omit the name of Honoré Bonet in the enumeration of prior commentators, it contains the germ at least of many a doctrine which is sanctioned by the authority of Grotius. If Scottish lawyers of to-day have inherited the likings of their "forbears," this book should have a special interest for them; for it was translated into good Scots prose about the middle of the fifteenth century at the request of the Earl of Orkney and Caithness, Chancellor of Scotland, by Gilbert of the Hay, Knight, Master of Arts in the University of St. Andrews, a characteristically inaccurate account of whose life and work will be found in that not very trustworthy biographical dictionary, Mackenzie's *Lives of Scottish Writers*.

The rubric of Sir Gilbert Hay's translation accurately sets forth the matter and subdivisions of the work. It runs as follows: "Here begynnys the Buke callit the Buke of the Law of Armyes, the quhilk was compilit be a notable man, Doctour in Decreis, callit Bonnet, Prioure of Sallon; the quhilk, quhen it was maid, callit it the Fleur of Bataillis, or the Tree; into the quhilk Buke thare salbe foure partis efter as the Rubryis schawis. The First part salbe, Of the Tribulacioun of the Kirk before the Natiuitee of Christe. The Second party salbe, Of the Tribulaciouns and Destruction of the Four Principale Realmes grettest of the World, &c. The Third salbe, Of Bataillis in generale. The Ferde, Of Bataillis in Specialitee."

The first two parts are, in short, a brief historical introduction to the main subject of the work, which is discussed in the third and fourth parts. It cannot be said that the author follows any systematic method in his exposition; but there is an engaging freshness in the common-sense view which he takes of the actual or hypothetical cases introduced as illustrations or exemplifications of his meaning. Most of these cases have, of course, been now rendered obsolete by the progress of civilisation. At the same time the mode of treatment of such cases, and the logical or ethical strength of the principles adduced for their regulation, exhibit in the prior of Salon a prudent foresight and a spirit of tolerance far in advance of the practice of his age. Thus, for example, the custom of wager of battle, which survived till the present century as a competent legal process in the Courts of England, and which may be said to survive till to-day in the duels of French fighting editors, is condemned in unqualified terms by our author. "I will plainly show," he says, "that to offer wager of battle and to accept it with a view of fighting is, according to Divine Law, the Law of Nations, the Canon Law, and the Civil Law, a thing reproved and condemned by reason." And he supports his point from each of the authorities cited.

Nor is it only in the treatment of obsolete questions that the Augustine monk has exhibited the perspicuity of his reasoning. His remarks on the immunity of peaceful persons and their

property from the risks of belligerents sum up a humane and advanced opinion upon a question which is under discussion by international jurists of the present day.

As an example of our author's manner, and of the special cases with which he deals, we may translate a chapter, the subject of which will perhaps be of interest to our readers.

CHAP. LXXXVI.—*Whether an English student, dwelling in Paris for the purpose of study, can be imprisoned.*

Now let us in this place glance at a question which may very often arise. In the first place it is quite well known that the King of France and the King of England are at war. Well, a licentiate of London has come to study at Paris and to become doctor of law and of theology. But a Frenchman imprisons him and the matter comes before the king. The licentiate says that he ought not to pay ransom, and he founds his opinion on law, saying that he has on his side a special case in view of the law which gives to him and to all students a very great privilege, and ordains that they shall be treated not with trouble and displeasure, but with all honour and reverence. And this is the reason why the law so maintains. What man, says the law, were he who would not take pity and compassion on the students who in order to acquire the higher sciences, have abandoned wealth and worldly pleasure, their friends and their country, and have, moreover, sought refuge, like exiles, in other nations. Ungracious indeed were he who would do them harm. But in answer to this the man of arms who has imprisoned the student replies, and says: "My very sweet friend, we Frenchmen care not for your laws nor for the emperor who made them *C. super specula*. And therefore I maintain that you are my prisoner in rightful war, for you are of the old enemies of the king, my sovereign lord, and of his realm; and further, you have no safe conduct or permit to come or dwell here." In answer to all this the licentiate brings forward the chapter *super specula*. "Sire," he says, "laws are nothing else than right reasons ordained according to wisdom. And if you care not for the laws, then it is because the lords of France have no love for reason. And besides, when the Emperor Charlemagne, with consent of the holy father, transferred the general school which was then held at Rome to the city of Paris, the pope and the emperor gave great and noble privileges to that school of Paris. And by that means the noble emperor drew from Rome to Paris masters and scholars of all languages. And why should they not be able to come, seeing that they are assured by the King of France." "Sire," answers the man of arms, "assuming that all scholars were assured by the King of France, a general war has been declared by the King of France against the King of England, and therefore no Englishman can or could come to study or to do any other thing, for under colour and shadow of such study you would be able to come into this town and write and despatch the secrets of the king and the condition of the kingdom to his enemies, from which the king might suffer great damage." Now, we must see which of them is in the right. And truly, in my opinion, if he is found to be a true scholar, that is to say, if he has not come feignedly and under false colour, or to spy upon the state of the king and his realm, I hold that he cannot be imprisoned unless the king has made a general order that no Englishman shall come into his realm for the purpose of study. And if any one doubts that the king can make such an order notwithstanding the papal privileges conferred upon students, I say that there must be no doubt about it; for if the archbishopric of Reims were vacant, or the bishopric of Paris, and the canons elected an Englishman, the king could oppose the election, and would be heard according to the opinion of all masters; and all for this reason, that it is not expedient for the kingdom or the king to have an enemy within his territory.

The learned editor of the work has prefixed to the text a brief but exhaustive introduction. In this he has collected all the available information regarding the work and its author, and has in a few critical paragraphs clearly defined the position of Honoré Bonet among mediæval jurists. No one could be better fitted for such a duty than the author of *Le Droit de la*

Guerre et les précurseurs de Grotius. M. Nys deserves the hearty thanks of every student of the Law of War for this admirably edited reissue of one of its earliest monuments.

Supplement, consisting of Marginal Notes to the Conveyancing Code, bringing it down to date, 15th October 1883. By J. HENDERSON BEGG, Advocate. Edinburgh: Bell & Bradfute. 1883.

WE have too long delayed noticing this ingenious and useful supplement. Instead of bringing out an entirely new edition of his *Annotated Conveyancing Code*, which was published in 1879, Mr. Begg has issued a series of notes, printed in the narrowest of columns on paper with a gummed back. These columns and notes are meant to be pasted on to the margins of the pages of the original book, their position being carefully indicated. Several Acts bearing on the subject of the work have been passed since its publication, and the effects of these are all carefully noted by Mr. Begg. Although this supplement is published for the express purpose of being "cut up," yet it is by the possessors of the author's book that this must be done and not by the reviewer. Indeed it is impossible for us to do so, because nothing but praise can be given these marginal notes. Besides being useful and accurate in themselves, they lay the profession under an obligation to Mr. Begg for having refrained from rendering the former edition of his book useless by bringing out a new one.

The Black Kalendar of Scotland: Records of Notable Scottish Trials. By A. H. MILLAR, F.S.A. Scot. With illustrations by Martin Anderson. First Series. Dundee: Leng & Co. 1884.

THE contents of this book bear the appearance of having been originally published in a newspaper; they are, however, worthy of being preserved in a separate form. The trials given in this volume are seven in number. We have first the story of Peter Young, an Aberdeenshire gipsy, famous for his many escapes from prison. Graham of Fintry is a tale of Queen Mary's days, while the Wife o' Deeside is a graphic account of a poisoning case which created considerable excitement in Forfarshire in 1826; professionally speaking, it is chiefly interesting from its being a leading case in support of the rule of law, that if a previous trial has been stopped by some unforeseen accident, such as the illness of a jurymen, the plea of *res judicata* will not be sustained at a subsequent trial. A long account is given of the trial of Mr. Stuart, of Dunearn, for the killing of Sir Alexander Boswell in a

duel ; in it are published for the first time two letters, one from Lord Balmuto, describing the scene immediately after the duel, and another from Miss Boswell, Lord Balmuto's daughter, giving a narrative of Sir Alexander's last hours. The story of Malcolm Gillespie, an excise officer in Aberdeenshire, who was executed for forgery, is next given, and the trial of the Glasgow cotton-spinners in 1837 is recounted with much circumstantiality of detail. The *Mystery of Craigcrook*, a tale of robbery and murder, concludes the book. The author has done his work skilfully and well, though a little condensation would occasionally have been an improvement. The illustrations, though simple in character, give a sufficiently vivid representation of the scenes referred to. We have no doubt the volume will be extensively read by all who take an interest in the records of criminal trials.

Obituary.

SHERIFF BARCLAY, LL.D.—The news of the death of this venerable judge and highly esteemed gentleman, which took place at his residence near Perth on the 1st of February, will be received with a very widespread feeling of regret, not only in the profession, but amongst the community of Scotland at large. Few county court judges were so well known as he was: not only in the extensive territory over which he had jurisdiction was the name of "Sheriff Barclay" a household word; it was known familiarly in Edinburgh, Glasgow, and many other large towns; it was well known in the Church Courts; and as an indefatigable contributor to this Journal, generally under the pseudonym of "Nestor," it must have been brought under the notice of lawyers for many years. Few men have lived such a long, honourable, blameless, and busy life as the late Sheriff. A descendant of Sir David de Barclay of Lindores and Cullairney in Fife, who was born about the year 1275, and whose ancestor was a younger son of one of the Lords Berkeley of Berkeley Castle in Gloucestershire, Hugh Barclay was born in Glasgow in 1799. After attending various private schools, he entered the University of his native town in 1811. He naturally took a leading part in the business of the Debating Society to which he belonged, and was also a pupil of Sheridan Knowles the dramatist, when that gentleman was a teacher of elocution in Glasgow. Notwithstanding a strong personal feeling for the Church as a career, Mr. Barclay was induced to enter upon the profession of law, and became an apprentice in the office of Mr. George Baillie, a Glasgow writer. He subsequently passed some time in Edinburgh, getting an insight into Court work, and it is of this period that he gave many

interesting reminiscences in the series of papers, entitled "The Parliament House in 1819-20," which appeared last year in this Journal. In 1821 he was admitted a member of the Faculty of Procurators in Glasgow; but the monotonous nature of office work did not altogether suit the active and versatile mind of Mr. Barclay. He had serious thoughts of coming to the Bar, but in 1829 his old master, with whom he had been apprenticed and who had subsequently been made Sheriff-Substitute at Dunblane, retired from that office, and induced him to become a candidate for the vacant Sheriffship. His application was successful, and he remained at Dunblane for four years, when he was transferred to Perth in 1833 by the late Lord Colonsay, who was at that time Sheriff of the county.

Mr. Barclay was now in a position which afforded ample scope for the exercise of his talents. It is stated that in 1834 he wrote 3615 interlocutors, disposed of 2217 small-debt cases, 20 jury trials, and 238 summary complaints. In addition to his professional work, he was ever active in promoting schemes of benevolence and philanthropy. He also instituted a course of lectures for the law apprentices in Perth, to whom for some time he expounded Erskine's *Principles* between eight and nine in the morning. As a legal author he is well known; his *Digest of the Law of Scotland, with Special Reference to the Office and Duties of a Justice of the Peace*, has been of much use to the profession; his minor works include a Sketch of the History of Schools in Scotland, and a Handbook relating to the Friendly Societies Act of 1875. He was also the author of a book entitled *Rambling Recollections of Old Glasgow*, and of a work on *The Curiosities of Phrenology*, besides many pamphlets on the religious and social questions of the day. A staunch supporter of the Church of Scotland, he was a frequent speaker in the General Assembly; it was, however, in no sectarian spirit that he went about his many works of Christian charity: all classes and all denominations were united in their esteem for the venerable Sheriff.

In the course of so long a life, Sheriff Barclay naturally saw many changes. Many of these he recorded in a letter which he addressed, on the occasion of his retirement, to the President of the Society of Solicitors in Perth, and which we published in a recent number of the Journal. We need not therefore now allude to them in detail. Proofs of the respect in which the learned Sheriff was held were not wanting during his life. About twenty-four years ago he received the degree of LL.D. from the University of Aberdeen. In 1868 the people of the city and county of Perth presented him with his portrait and a cheque for 500 guineas as an expression of the high esteem in which he was held, and as an acknowledgment of the valuable services rendered, amidst the anxieties and labours of an honourable profession, to every cause having for its object the elevation and improvement of his fellow-

men. In 1878, on the occasion of his completing the fiftieth year of his work as a Sheriff-Substitute, he was entertained at a banquet in the Perth County Hall, presided over by Lord Adam, and attended by a most representative gathering of 200 gentlemen.

To the readers of this Journal, and to him who pays this imperfect tribute to his memory, the removal of Sheriff Barclay will come almost as a personal loss. For years he took much interest in the Journal; few months passed without something from his pen appearing in it. Often it was a judgment in a Sheriff Court case, and sometimes it took the form of an article or digest of some blue-book of statistics; but whatever it was, the author always contrived to make it interesting, or enliven it by some humorous expression or quaint phrase. Never a very elegant or even accurate writer, Sheriff Barclay wrote much and never ineffectively. The reader always felt that the author had something to say, and said it in a direct and straightforward way.

His work is now done; the familiar signature of "Nestor" will never again appear in these pages. To us is left the recollection of a life full of "honest toil and lively charity," the life of one who was a good and hardworking judge, a genial friend, and a Christian gentleman.

WILLIAM BLACKWOOD, Esq., writer, Peebles.—We have to record the death of this gentleman, which took place at his residence in Peebles on the 5th February. Mr. Blackwood commenced business in Peebles nearly fifty years ago, and was universally respected and esteemed by all classes of society. He had a large practice, and numbered many influential persons in the county among his clients. As agent for the Conservative party he was particularly well versed in the law relating to registration of voters and in all the machinery of election contests. Besides his private practice, he held the appointment of agent for the British Linen Company's Bank in Peebles; he was also clerk to the Commissioners of Supply, collector of the county rates, and clerk to the Peeblesshire Road Trustees. He frequently sat as a representative elder in the General Assembly of the Church, and took part in the debates. An able, genial, and kindly man, he will be much missed in the county. He was sixty-nine years of age.

JOHN NAIRNE FORMAN, Esq., W.S.—We have to record the death of this gentleman, which took place on the 30th January. His removal from amongst us severs another of the links which bind this generation to the Edinburgh of the past. Mr. Forman's father began business as a Writer to the Signet in this city about 1790. His son, the subject of this notice, was born on 10th April 1806, and was consequently in his seventy-eighth year at the time of his death. He was educated at the Edinburgh High School and University, passed as a Writer to the Signet in 1827, and after-

wards became a partner in his father's business. On the death of his uncle, Mr. James Nairne, of Claremont, W.S., he succeeded to a large share of his business, including several influential agencies, and he was fortunate in being chosen as his successor in the honourable position of agent to the Faculty of Advocates. When Cockburn Street was projected as a means of access to the railway station, Mr. Forman took a keen interest in the matter, and was one of the original promoters of the scheme. He sat as a director on the Board of the Insurance Company of Scotland for many years. He was also a member of the Royal Company of Archers, and was frequently a successful competitor for their various prizes. Of a singularly modest and unassuming character, Mr. Forman never took any leading part in public affairs. He was highly esteemed for his integrity and ability in business, and in private life he was surrounded by a circle of attached friends. He was long a member of the kirk-session of St. Stephen's, and took a warm interest in the work of that parish. Failing health necessitated his retirement from business about ten years ago; and the cold weather of the last week in January, which produced a sharp attack of congestion of the lungs, cut suddenly short a life the tenure of which was already rendered precarious by illness. Mr. Forman is survived by five daughters and three sons, one of whom still carries on his father's business as a Writer to the Signet.

The Month.

In the Matter of Robes.—Occasionally in the columns of the "baser sort" of newspapers we find silly writers sneering at the "absurdity" and "tomfoolery," as they call it, of distinctive, forensic, and judicial costume. These choice creatures generally quote America as a country where no nonsense of that sort is tolerated, and where all legal proceedings are conducted in the tweed or broadcloth of everyday life. We commend to the notice of all who consider legal costume a matter either of personal vanity or professional millinery, the following extract, which we take from our clever contemporary the *Albany Law Journal*. It shows the tendency of a country as it gets older to insist that its public functionaries should be enabled to perform their duties in a decorous and dignified manner:—

At the convening of the Court of Appeals on Tuesday last, Mr. David Dudley Field presented the following resolutions of the State Bar Association:—

Resolved, That the example of the Supreme Court of the United States and of other Courts in our country in retaining the use of

the black silk robe when in session is in accordance with the historical traditions of our judicial institutions, and agreeable to a cultured public taste.

Resolved, That their Honours, the Chief Judge and the Associate Judges of the Court of Appeals of this State, be and are memorialized on this subject, and respectfully recommended favourably to consider the adoption by them of similar robes when sitting *in banc*.

In presenting the resolutions Mr. Field said—The New York State Bar Association at its annual meeting, on the 8th instant, appointed me its committee to present to you at the opening of your present session the resolutions of that body, recommending that the judges of the Court of Appeals, while holding court, should wear robes of office. The appointment devolves an agreeable duty upon me, because it enables me not only to serve my brethren, but to express my own views and wishes. And in doing so, you will allow me, I am sure, to give some of our reasons. A badge of office has been worn by judges the world over. A custom so general must have a foundation in reason. It is possible, no doubt, for a rude sort of justice to be dispensed without ceremony or sign of office. We can imagine judges at one end of a table, and lawyers at the other, all sitting and covered, debating the cases across the table while a promiscuous crowd of suitors surges through the room, and it might happen for a while that the guilty would be punished, the innocent released, and the spoiler deprived of his spoil; but we think the scene must end in general confusion and contempt. The simplest rule of ceremony requires judges, counsel, and audiences to be uncovered, the judges to sit apart on raised seats, and the counsel to stand while addressing the Court or examining witnesses. To this has been lately added that the Court and the Bar exchange salutations as the judges take their places. Should there be anything more? The answer depends upon a consideration of what would be the most becoming in the dress, language, and demeanour of those who participate in the administration of justice. We think that some insignia of office would befit the high judicial functions which you exercise, and that none can be found so appropriate as the robe, so unostentatious, and so conformable to the usage of our forefathers. The robe has been worn by judges from time immemorial. In one of the oldest books of our race the hero is made to boast that his "judgment was as a robe and a diadem." The ermine is a synonym in our literature for spotless justice. In the Palace of Justice of France and in the Westminster Hall of England, the judicial function has always been performed in the judicial robe. In our own country the judges of our fathers' times sat in robes. The judges of the Supreme Court of the United States have never entered the chamber where their august functions are performed without wearing their robes of office. Mar-

shall, Story, and Nelson wore them. The garment is no more a badge of monarchical than of republican office. Indeed, insignia of office more befit a republican than a monarchical country, for while in the latter they represent the majesty of the throne, in the former they represent the majesty of the people. These insignia tend to inspire respect and to gratify sentiment, and it is sentiment, after all, which sways the world. The flag is the expression of a feeling, an instinct that is universal. "An army with banners" is described in our most sacred record. What but sentiment has adorned these walls, that our highest seat of justice might have fit surroundings? If ever a sordid motive has had part in the raising of this building, it was nevertheless the sentiment of the people which laid the foundation-stone and raised the topmost tower; a feeling that the people's house should be worthy of the people; that the place where their great officers discharge their trusts should be not only ample and convenient, but commanding in its decorations as in its proportions.

If our highest Court of Justice is ever to have any insignia of office, there can be, as I have said, none better than the robe; none simpler or more graceful and convenient. It is the easiest to put on, and the easiest to lay aside; it requires no other change of dress; it is simpler than the uniform which officers of the army and navy wear; simpler than the costume which society exacts on many occasions. For these reasons we ask you to wear it, as befitting your great office and consonant with our republican ideas of simplicity and dignity. And when in the long years and generations that will pass, before this Capitol crumbles into dust, as often as the door of this chamber is opened to receive you and your successors, coming in the name of the law, may all men know that you come to render justice and judgment, without fear or favour, spurning dictation, deriding calumny, and conscious that rectitude of purpose is its own reward.

"Tantum a vobis petimus, ut omnia rei publicæ subsidia, totum statum civitatus, omnem memoriam temporum præteritorum, salutem præsentium, spem reliquorum, in vestra potestate, in vestris sententiis, . . . positam esse defixam putatis."

Chief Judge Ruger on behalf of the Court made reply as follows: We are much gratified by the interest which the resolutions presented induces us to believe that the Bar of the State feel in the ceremonial and dignity to be observed by this Court in the performance of its judicial duties. Neither can we omit to express our gratification at the selection of one of the oldest and most honoured members of the legal profession through whom the Bar Association have communicated their wishes to us. The resolution presented merits and will receive the respectful attention of the Court, and will be considered with a view of arriving at that result which will be most likely to promote a dignified and efficient administration of the law.

"My difficulty here has been to determine what the defender's statement really amounts to, and whether his qualification is inherent and intrinsic. I have come to the opinion that it is, that the representation of the probable cost of his work, which, it must be assumed, was made by the pursuer, and led to his employment, bars him from now claiming this alleged balance. He may not have been exactly tied down to the sum of £10, but the defender has already paid him a considerably larger amount. The ground upon which the defender denies liability is no vague averment of overcharge, he can found upon what actually took place when the pursuer offered to do this work, and he accepted that offer.

"I see no facts in this case favourable to the pursuer. The work was all done in 1880; in the same year the sums credited were duly paid to him. Why does this claim for a balance start up in 1884? The pursuer has only himself to blame, if by his delay he has excluded possible explanation, and given to the defender the benefit of this plea of prescription."

SHERIFF OF CAITHNESS.

Sheriff THOMAS and Sheriff-Substitute SPITTAL.

SIMPSON v. MACKENZIE.

Quarry—Right of yearly tenant of farm to interdict access thereto—Case where interdict refused as no title to the quarry had been got from landlord.—The pursuer and defender held by verbal lease and tacit relocation adjoining farms on the Hempriggs estate. The defender watered his horses at a quarry situated on pursuer's farm. This access to and use of the quarry the pursuer now sought to interdict. After proof, the Sheriff-Substitute pronounced this interlocutor:—

"Wick, 6th November 1883.—Having considered the process and heard parties' procurators: Finds (1) that the pursuer has been for several years, and is now tenant of the farm marked 'William Simpson's farm' on the sketch No. 20 of Process, the farm being bounded on the west by a road leading southwards from the junction of the Keiss and Wick roads to Nordwall; (2) that on said farm there is a quarry about 6½ chains along the Nordwall Road, access being had to said quarry from the Nordwall Road by a cart road or track 2 chains in length; (3) that said quarry and cart road or track are wholly situated on the pursuer's farm; (4) that the defender, who is tenant of the adjoining farm marked 'George Mackenzie's farm' on said sketch, and others of the neighbours have been in use for several years to take occasional supplies of water from said quarry; but finds (5) that the defender has failed to prove any right on his part to take such supplies of water, or to visit said quarry without the leave of the pursuer: Therefore grants interdict in terms of the prayer of the petition: Finds the pursuer entitled to expenses, allows an account thereof to be lodged, and when lodged remits the same to the Auditor of Court to tax and report, and decerns.

"(Signed) CHARLES GREY SPITTAL.

"*Note.*—There is no doubt that the pursuer's neighbours have been for long accustomed to take supplies of water from the pursuer's quarry whenever it was convenient for them to do so; and as there seems to be a good supply of water there, it is not easy to see that the pursuer suffered any injury through these visits of his neighbour so long as they kept on

the road, and did not trespass and allow their beasts to trespass on the pursuer's field. But unfortunately the pursuer and defender are not on good terms, and the pursuer has chosen to forbid the defender from using the quarry. I think he is legally entitled so to forbid him, and that the defender must get his water elsewhere. Where he is to get it in future, I think immaterial to the present case. (Intd.). C. G. S."

Against this judgment the defender appealed to the Sheriff, who pronounced the following interlocutors:—

"The Sheriff having resumed consideration of the defender's appeal with reclaiming petition and answers and whole process, supersedes consideration of the appeal, and appoints the pursuer to lodge a minute stating the full details of his own tenancy—that is, his ish and entry; the extent, contents, and boundaries of his farm; and how these are defined, whether by the possession of his predecessor or otherwise; and the rent he pays; and also, if he knows them, the same particulars regarding the defender's tenancy; said minute to be lodged within eight days from the date of this interlocutor.

GEO. H. THOMS.

"*Note.*—The particulars required in the minute ordered should have been called for at adjustment by the Sheriff-Substitute, and added to Article I. of the pursuer's statement, so as to have obtained the defender's answer. The only other alternative was to have got these details out of the witnesses at the proof, or by the production of leases, etc., if writing passed at the letting or subsequently. The proof has been closed without these necessary details having been obtained, and the course adopted in the above interlocutor seems to be best fitted in the circumstances to utilize the expense which has been incurred.

G. H. T."

A minute and answers were accordingly lodged, admitting that the parties were both merely agricultural tenants, holding by verbal tenure, and this interlocutor was thereupon pronounced:—

"The Sheriff having resumed consideration of the defender's appeal and whole process, sustains said appeal, and recalls the interlocutor of 6th November last submitted to review: Finds that the pursuer is not tenant of the quarry as regards access to which the present action of interdict is brought, sustains the defender's plea of no title to sue, and assoilzies the defender with expenses as the same may be taxed according to Scale I. of the Act of Sederunt, and decerns.

GEO. H. THOMS.

"*Note.*—An agricultural tenant is not tenant of a quarry of stone or other minerals on his farm without special bargain. Mr. Hunter (Dove Wilson's edition, I. 206) says: 'The rule is express that the landlord is entitled *ex lege* to the minerals, and consequently to work them with a right of access and other accommodations.' The pursuer here has only proved that he is a yearly agricultural tenant of a farm. When the pursuer ploughed up the old road to the quarry on his farm, he very properly made a new one. The pursuer proves that Sir George Dunbar at one time proposed to take the water of this quarry for his house of Ackergill Tower, and asked and obtained no leave of the pursuer to do so. Thus on the pursuer's own showing he is not tenant of the quarry to which solely this action relates, and has no title to interdict the defender from going to it. Had he averred any trespass on his fields by the defender, the case would have been different; but as his petition only sets forth trespass against the defender 'by passing through the lands of the

said farm with his horses or other bestial to a quarry,' and particularly 'with two horses on the 17th, 18th, and 20th days of September current 1883,' and this alleged trespass is shown by the proof to have been by the road which the pursuer made to give access to the quarry, no case for interdict has been made out. G. H. T."

SHERIFF COURT OF PERTH.

Sheriffs MACDONALD and BARCLAY.

MITCHELL v. SIM AND ANOTHER.

Burying-ground.—This was an action to have a corpse removed from the grave where interred, the pursuer claiming that the grave had been allocated to him, and that his kindred had been buried therein for long time. The following interlocutors were pronounced:—

"*Perth, 26th June 1883.*—Having heard parties' procurators, and made avizandum with process, proofs, and debate: Finds as matters of fact,—

"*First,* Both parties had ancestors or kindred interred in Blairgowrie Churchyard for a succession of years, and there in lairs closely adjacent to each other.

"*Second,* On 11th November 1881, Elizabeth Stewart or Robertson was interred in said churchyard, and that by directions of the defender Thomas Sim, who was a brother-in-law of the said Elizabeth Stewart or Robertson, and the body was interred by the defender John M'Donald, the sexton of the said churchyard, on an order for interment by the clerk of the heritors; and the other defenders are called in this action as next of kin to the deceased, but it is not proved they were concerned in the interment, but nevertheless appear and defend the same, and the right of that interment.

"*Third,* The pursuer complains that the body of the said Elizabeth Stewart or Robertson was laid in a lair or lairs '*belonging to the pursuer,*' and craves that the *whole* defenders be ordained to remove the said body, failing doing which he craves warrant 'for its exhumation and removal, and to *reinter the same* in any vacant part of the said burial ground which may be obtained from the heritors for the said purpose;' and to decern for the expenses hence incurred; and for interdict against any interment in any portion of the adjacent ground forming the lairs '*pertaining by allocation, custom, or occupancy to the pursuer or his family.*'

"*Fourth,* The pursuer has failed to prove that the body of Elizabeth Stewart or Robertson has been interred in any lair or ground allocated or otherwise appertaining to him so as to warrant the decrees sought; therefore assoilzies the defender from the conclusions of the action, but under the circumstances finds no expenses due to or by either party, and decerns.

(Signed) HUGH BARCLAY.

"*Note.*—This case has been keenly contested, but not more so than from its subject-matter might be expected, where feelings of the most tender, perhaps even sacred character are let loose. To warrant the decrees here sought there must be clear and indubitable proof of a *wrong done*, and not by innocent mistake, but obviously in violation

of *distinct rights*. Even with such evidence the opening of a grave, and removal of a body therefrom, and reinterment, would renew the anguish of the relations of the deceased party, and not without somewhat of the other family, the bones of whose relatives must thereby be disturbed. The vicinity of the ashes of the departed rest in peace, and their adjacency can do no harm to either class of kindred.

“Both parties here, as is not uncommon, argue their case as one of *property* or *ownership*. There can be no *right of soil* in a parochial churchyard, but only of *occupancy*. Property in land has its *duties* as well as its *privileges*, its *burdens* as well as its *rights*. Landholders have many duties to perform to the inhabitants of the surface. Under wise and very ancient Scottish laws they were taken bound to provide a school-house and a schoolmaster for the education and upbringing of the parochial young; to provide a clergyman with a church and manse to minister to the moral and religious wants of the population of the parish; to provide sustenance for the decayed, who by age and bodily infirmity cannot earn their own livelihood; and, finally, to provide a golgotha (God's acre as well termed) to bury the dead parishioners whose life's course have run its final term. There can be no feudal property in any portion of a churchyard. It may be said to be truly the property of the heritors, but only in trust specially dedicated for one and only purpose, the burial of the dead parishioners. It is excluded from *commerce*, and rather ranks amongst things *sacred*. The heritors have the management of the area, and must allocate certain lairs or portions of the soil for the interment of the dead parishioners. They may add to its extent as may be required, but, as recently decided in the case of the Marquis of Bute, they cannot *alienate* any portion of the area even to an heritor.

“There may be, and has frequently been, in this and other Courts, both supreme and local, many possessory questions between parishioners, both as to seats in parish churches and lairs in parochial churchyards, as to rights of *possession*, but never as to property. The right to sit in a *particular pew* in the parish church, or to have a body interred in a particular lair in a churchyard, has often been made the subject of legal disputes. In both class of cases interdicts have been granted, and even exhumation and removal of dead bodies from one part of a churchyard to another. The churchyard of Blairgowrie perhaps, because of the marvellous increase of its population, appears to have been for some years anything but well kept and regulated. There was no map or plan for the exact ascertainment of the allocated lairs, and apparently no record of particular interments therein. Such arrangements were unfortunately entrusted solely to the sexton, and consequently it is not astonishing that bodies were sometimes ignorantly and irreverently deposited in graves previously tenanted by the bodies of other families. There is also a question and a diversity in evidence as to the breadth of each lair, or as in this case a body being placed partly in one and partly in another lair. To some families there were allocated three, and to others four lairs, without any seeming rule or regulation. The pursuer claims four lairs, the defenders only three. The allocation of the *fourth* lair claimed by the pursuer is nowise clearly proved, seemingly only by being obtained by permission from the sexton, who had no right to make any allocation. The three lairs claimed by the defenders are also by no means clearly ascertained

by their exact position. It is therefore, after repeatedly reading the proofs, for the Sheriff to say which party is in the right, that is, whether the body in question was laid in one of the *four*, or one of the three, or *partially* in one of the four and partially in one of the three. In these circumstances it would be somewhat revolting, alike to feeling and justice, to disturb the body, and again arouse the feelings of relatives by a second interment. Whilst the Sheriff feels satisfied that the pursuer has failed to prove that the grave in which the body in question was deposited was regularly allocated to him, and that any of the bodies of his kindred were interred in that very lair, the defenders have equally failed to prove similar important facts. Both parties also placed their rights as those of property, not mere possession. It is now the usual course of judicial procedure to award costs to the successful party against the unsuccessful, but in this case the Sheriff considers *both* parties to be in substance *unsuccessful*, and that the matter might have been with great care amicably arranged, and that therefore neither ought to have costs.

"Now that the ancient churchyard of Blairgowrie since the year 1877 has been finally closed as 'being offensive and contrary to decency,' with the very limited exception of very near kindred to the bodies previously interred, and that there is now a very suitable cemetery adjacent, it is not likely that there will be many more interments hereafter. Therefore, seeing that the graves of the parties are so intermingled, and there is still ample space for some few future burials, it would be well that parties would amicably define the peculiar lairs appropriated to each family. Trusting on such amicable arrangement, the Sheriff recommends application to the heritors' clerk, Mr. Soutar, who would gladly make such arrangement which would prevent all future altercations and disagreements of most painful character. (Intd.) H. B."

"*Edinburgh, 4th December 1883.*—The Sheriff having made *avizandum*, and considered the whole proceedings, adheres to the interlocutor of the Sheriff-Substitute, except in so far as no expenses are thereby found due to the defenders, and decerns; finds the defenders entitled to the expenses of process; allows an account to be lodged, and remits the same to the auditor to tax and report. (Signed) J. H. A. MACDONALD.

"*Note.*—The Sheriff, like his Substitute, has again and again anxiously considered this case, but has been unable to come to the conclusion that the pursuer has discharged himself of the *onus* undertaken by him in raising the petition. The evidence is very conflicting, and in some respects irreconcilable. The Sheriff was much struck by the sketch No. 25 of process, which is a mutual sketch representing the contention of parties in regard to the position of the lairs. There seems to be a substantial agreement as to the position of the coffin, the burial of which has caused the dispute. But on looking at the sketch it becomes manifest that, if the previous adjustment of the lairs had been as contended for by the pursuer, the digging of the grave in question could only have been effected by cutting down through coffins in lair No. 3 of the ground, as contended for by him. Now there is no evidence whatever that any such thing occurred, and it is not reasonable to suppose that if, in digging down, a coffin projecting into the lair being dug had been come upon it would not at once have been manifest that a mistake was being made, and the position of the grave altered. Further, the pursuer's contention

requires that 3 feet in width should be allocated to each lair. This seems to be wider than is at all needful, and 2 feet 9 inches, which the defenders contend for, seems more reasonable. These circumstances seem to confirm as real evidence the impression formed on considering the parole proof, that no clear and certain case had been made out for the pursuer. It would of course be most improper to interfere with past interments in a churchyard, unless the evidence was conclusive that existing rights had been violated.

"As regards expenses, the Sheriff sees no ground why the defenders should have to suffer the loss of their own costs in this protracted litigation. They have been challenged as doing a wrong, and the accuser has failed to establish his case. The Sheriff cannot see reason to hold that they have done anything in conducting their defence to exclude them from the ordinary result of success, and the agent for the pursuer was unable when the question was put to him at the debate to state any ground of a substantial kind why that result should not follow.

"(Intd.) J. H. A. M."

Notes of English, American, and Colonial Cases.

COMPANY.—*Debentures*—*Irregularity in issue of*—*Debentures issued to contractor to obtain money*—*Estoppel by conduct*—*Company not permitted to set up invalidity as against equitable transferee.*—A company, having power to issue debentures transferable at law, issued certain debentures to their contractor to enable him to obtain an advance for the purposes of the company. There was an irregularity in the issue of these debentures of which the contractor was aware, but the debentures on the face of them purported to be regularly issued for valuable consideration, and to be legally transferable. The debentures subsequently came into the hands of transferees for value who had no notice of their regularity, but whose transfers were never registered: *Held*, that as the original conduct of the company in issuing the debentures was such that the public was justified in treating it as a representation that the debentures were legally transferable, there was an equity on the part of the equitable transferees to restrain the company from pleading their invalidity, although the irregularity in their issue might have been a defence at law to an action against the company by their transferors. But *held*, that the right of the transferees being only equitable, relief must be given to them on equitable terms, and that they ought to be allowed, in the winding-up of the company, to prove, not for the nominal amount of the debentures, but only for such sum, not being greater than that amount, as each of them might be able to prove he *bona fide* advanced upon the security of the debentures he received, such proof, however, being allowed to them in the character of debenture-holders, with all the advantages attaching to that position.—*In re The Romford Canal Co.*; *Carew's, Pocock's, and Trickett's Claims*, 52 L. J. Rep. Ch. 729.

COMPANY.—*Directors*—*General meeting*—*Powers of*—*Remuneration for past services*—*Compensation to dismissed officials*—*Gratuitous payments*—

Companies Clauses Consolidation Act, 1845 (8 and 9 Vict. c. 16), ss. 90 and 91—Regulation of Railways Act, 1868.—Directors of a trading company have, incidental to their office, the power of doing that which is ordinarily and reasonably done with a view to getting either better work from their servants, or to attract customers.—*Hulton v. The West Cork Rail. Co.* (App.), 52 L. J. Rep. Ch. 689.

The test whether a majority can bind the minority in voting the company's money, must be whether the proposed payment is reasonably incidental to and within the scope of carrying on the business of the company for the company's benefit.—*Ibid.*

Remuneration of directors for past services, and compensation to meritorious officials on dismissal (both of which are gratuitous payments), are justifiable, provided that they are likely to conduce to the advantage of a company in the future. Therefore, to justify any such payments, the company must be a going concern.—*Ibid.*

Where, therefore, a company had ceased to exist as a profit-making company, and only continued for the purpose of regulating their internal affairs, of winding-up the same, and distributing when received the sums which had been fixed by arbitration as the purchase-money for its undertaking: *Held* (by Cotton, L.J., and Bowen, L.J.; *dissentiente*, Baggallay, L.J.), that it was not within the power of the directors themselves, or of a general meeting of the company, to pass a resolution voting remuneration to the directors for their past services prior to the transfer of the undertaking, and compensation to officials who had been discharged in consequence of such transfer.—*Ibid.*

But *held* by the Court, that the company could in general meeting vote a reasonable sum for remuneration for services during the winding-up.—*Ibid.*

Semble, a resolution voting the distribution of a sum of money, first in paying certain expenses properly payable thereout, the amount of which can only be estimated, and the balance among the directors by way of remuneration, even though remuneration is properly payable, is bad.—*Ibid.*

The resolution should take the form of a vote of a sum not exceeding an ascertained amount to be paid out of the balance—*per* Cotton, L.J.—*Ibid.*

The winding-up of a company is as much a part of the business of a company as its formation—*per* Baggallay, L.J.—*Ibid.*

COMPANY.—*Winding-up—Resolution for voluntary liquidation—Compulsory order—B contributories—Commencement of winding-up—Companies Act, 1862 (25 and 26 Vict. c. 89), ss. 38, 84, and 130.*—A company passed a special resolution for voluntary liquidation, and was afterwards ordered to be wound up under a compulsory order. Shareholders transferred their shares less than a year before the passing of the special resolution, but more than a year before the presentation of the petition on which the compulsory order was made: *Held*, that they could not be placed on the list of B contributories.—*In re The Taurine Co. (Lim.)*, 52 L. J. Rep. Ch. 688.

PATENT.—*Practice—Use of independent scientific assistance by the Court—Procedure in case of alleged infringement by use of a secret process—Infringement—New process—New result—Chemical equivalents.*—Where

in a patent case the evidence is conflicting and indecisive on a scientific point, the Court is at liberty to obtain competent independent scientific assistance in determining the matters at issue.—*Badische Anilin und Soda Fabrik v. Levinstein*, 52 L. J. Rep. Ch. 704.

Where in a patent case the defendant denies infringement, but objects to state in open Court the process he actually practises, on the ground that it is the subject of a valuable secret, of the benefit of which he would be deprived by disclosure, the Court will first ascertain whether the defence fails in all other respects than infringement, and then, unless the defendant prefers to submit to an injunction, will hear the evidence and arguments with respect to the alleged infringement by the secret process with closed doors, and, with a view to further protecting the secret, will order the shorthand notes of the private hearing to be impounded until either an appeal is entered or the right to appeal is abandoned.—*Ibid.*

Where a patent is obtained for the use of particular chemical materials for arriving at a particular chemical result, it is no infringement to arrive at the same result by the use of other chemical materials which were not known to be equivalents for the materials mentioned in the specification at the time when the patent was obtained.—*Ibid.*

Where a patent is obtained for a new process for arriving at a known result, it is no infringement to arrive at the same result by a different process.—*Ibid.*

Where a patent is obtained for a new result, and one process of arriving at that result is described in the specification, it is an infringement to produce the same result by any process.—*Ibid.*

COPYRIGHT.—*Musical Composition*—*Right to sole liberty of performing*—*Performance at a place not a place of dramatic entertainment*—*Right to recover penalty or damages*—3 and 4 Will. IV. c. 15, s. 2; 5 and 6 Vict. c. 45, ss. 20 and 21.—By 3 and 4 Will. IV. c. 15, s. 1, the author or his assignee has as his own property the sole liberty of representing for a certain period, at a place of dramatic entertainment, an unpublished dramatic piece.—*Wall v. Taylor*; *Wall v. Martin* (App.), 52 L. J. Rep. Q. B. D. 558.

By section 2, if any person represents such a piece without permission at any place of dramatic entertainment, he is made liable to the payment of an amount not less than 40s., or to the full amount of the benefit received by him, or of the injury sustained by the owner, whichever shall be the greater damages.—*Ibid.*

5 and 6 Vict. c. 45, s. 20, creates a right in the sole liberty of representing or performing any musical composition; and section 21 enacts that the person who has the sole liberty of representing a dramatic piece or musical composition shall have the remedies given by 3 and 4 Will. IV. c. 15, "as fully as if the same were re-enacted in this Act."—*Ibid.*

In an action by the owner of the sole liberty of performing a musical composition, which was not a dramatic piece, to recover penalties for the unauthorized performance of that composition at a place which was not a place of dramatic entertainment: *Held* (affirming the judgment of the Queen's Bench Division), by Brett, M.R., and Bowen, L.J. (*dissentiente* Cotton, L.J.), that the plaintiff was entitled to

recover the penalty given by 3 and 4 Will. IV. c. 15, s. 2, and was not limited to the recovery of damages only, for that the right to recover the penalty is not confined to cases in which there has been an infringement of the sole liberty of performing a musical composition by an unauthorized performance at a place of dramatic entertainment.—*Ibid.*

PUBLIC HEALTH ACT (38 and 39 Vict. c. 55), s. 264.—*Thing done under the provisions of the Act—Notice of action—Limit of time for bringing action—Action to recover money paid under mistake of fact.*—The defendants, an urban sanitary authority, believing that a certain lane was not a highway repairable by the inhabitants at large, required the plaintiffs, as owners of land abutting on it, to execute certain works upon it, pursuant to the provisions of the Public Health Act, 1875; and on the plaintiffs failing to comply with the notice, the defendants did the work themselves, pursuant to section 150 of the Act, and charged the plaintiffs with their proportion of the expense thus incurred. The plaintiffs also believed that the lane was not a highway repairable by the inhabitants at large, and they therefore paid to the defendants the sum so claimed; but on discovering afterwards that the lane was such a highway, and that the defendants were not entitled to require them to execute the works specified, they brought an action to recover the amount so paid by them. They gave notice of action a month before issuing the writ, but this notice was given and the action was begun more than six months after the payment made by them:—*Held*, that the plaintiffs could not recover the money thus paid, inasmuch as they were suing the defendants in respect of something “done or intended to be done or omitted to be done” under the Public Health Act; that the provisions of section 264 of that Act applied, and therefore that the action could not be brought more than six months next after the accruing of the cause of action.—*The Midland Railway Company v. The Withington Local Board* (App.), 52 L. J. Rep. Q. B. D. 689.

SHIP AND SHIPPING.—*Charter-party—Bill of Lading—Incorporation of terms of charter-party—Inconsistent terms—Demurrage—Port of discharge.*—By a charter-party made between the plaintiff and the defendants it was stipulated that the liability of the defendants should cease “as soon as the cargo is on board the vessel holding a lien upon the cargo for freight and demurrage.” The bills of lading contained the words “he or they paying freight and all other conditions as per charter-party.” The defendants were the owners and receivers of part of the goods the subject of one of the bills of lading, having endorsed the said bill of lading to indorsees for value as to the other part of such goods. By reason of delay in discharging the goods of which the defendants were owners and receivers, the vessel was delayed five days beyond the lay days, and the plaintiff claimed demurrage for that delay:—*Held*, that the words, “he or they paying freight and all other conditions as per charter-party,” did not operate to incorporate conditions of the charter-party inconsistent with the other terms of the bill of lading, and that the conditions in the charter-party were incorporated in the bill of lading as far as they applied to demurrage at the port of loading, but did not extend to absolve the defendants, as owners and receivers of the goods, from liability for demurrage at the port of discharge.—*Gullichsen v. Stewart Brothers*, 52 L. J. Rep. Q. B. D. 648.

THE JOURNAL OF JURISPRUDENCE.

PROVIDENT NOMINATION AND SMALL INTESTACIES ACT, 1883 (46 AND 47 VICT. c. 47).

AN Act under the above title was passed towards the close of last session. It contained nothing very new in principle, but it extended to a considerable extent the rights which members of certain societies previously had of nominating a person to whom moneys payable at their decease might be paid. The maximum sum previously allowed to be bequeathed by nomination was £50; now it is raised to £100, and the right of nomination is extended to depositors in Savings Banks. Such is the general scope of the Act; but before discussing it in detail it may be expedient to glance at the history of former legislation on the subject, more especially as the terms of the present Act are such as may possibly give rise to some difficulty in carrying them out.

In the Act 7 and 8 Vict. cap. 83, relating to Saving Banks, it was enacted that in the case of the deposits of any person deceased not exceeding £50, exclusive of interest, if probate of the will of the deceased depositor, or letters of administration, were not produced to the trustees of the bank, or if notice of intention to prove the will or take out letters of administration was not given within a month, the trustees were empowered to pay the money to the widow, or to the persons appearing to them to be entitled to the effects of the deceased. This Act, however, was repealed by the Savings Banks Acts Amendment Act, 1863 (26 and 27 Vict. cap. 87). Sections 41, 42, and 43 of the last-mentioned Act contain certain provisions which are affected by the Act of 1883, and which therefore we may shortly note. By sec. 41 it was enacted that in case of a depositor dying, leaving a sum exceeding £50, it was not to be paid until after confirmation; if, however, the whole estate was under the value of £50, it was exempted from stamp duty, and by sec. 42 bonds on obtaining confirmation were also exempted. Secs. 43 and 44 repeat in effect the provisions contained in sec. 10

of 7 and 8 Vict. cap. 83, to which we referred above. As cognate to this branch of the subject, it may be mentioned that, by the Government Annuities Act, 1882, sec. 6 (e), the Postmaster-General may, with consent of the Treasury, make regulations for enabling a person to whom an insurance is granted to nominate a person to whom the money due under such insurance, not exceeding £50, may be paid on the death of such person.

With the view probably of encouraging provident habits among the industrial classes, the Government has always bestowed a certain amount of fostering care on Friendly Societies and their members. By the Friendly Societies Act of 1855 (18 and 19 Vict. cap. 63) it was provided that when, on the death of a member of a registered society, a sum of money not exceeding £50 became payable, the same should be paid by the trustees of such society to the "person directed by the rules thereof, or nominated by the deceased, in writing deposited with the secretary—such person being the husband, wife, father, mother, child, brother or sister, nephew or niece, of such member." If there was no nomination, or a revoked nomination, or if the nominee had predeceased the nominator, the trustees were then to pay the money without confirmation to the persons who appeared to them to be legally entitled to receive it; such payment being valid and effectual with respect to any other demand from other persons against the trustees or the society. The above-mentioned Act was repealed by the Friendly Societies Act of 1875, but similar provisions were there inserted. By sec. 15 (3) of that Act it is provided that any member above sixteen may, "by writing under his hand, delivered at or sent to the registered office of the society, nominate any person (not being an officer or servant of the society)" to whom moneys due at his decease, not exceeding £50, may be paid. Power to vary and revoke is also given. By the Amendment Act of 1876 (39 and 40 Vict. cap. 32) the above provision was altered of inserting after the words, "not being an officer or servant of the society," the words "unless such officer or servant is the husband, wife, father, mother, child, brother, sister, nephew or niece, of the nominator." Such was the position of the law as regards nominations in Friendly Societies down to the passing of the Act now under consideration.

The power of nomination was first granted to members of Industrial and Provident (or as they are generally called, Co-operative) Societies by 25 and 26 Vict. cap. 87, sec. 16. Under this section the provisions of the Friendly Societies Act, 1855, were extended to Co-operative Societies, to the effect of allowing any member to nominate any persons to whom his interest in the society might be transferred, the society always having power to elect to pay the value of such interest instead. In the Act of 1867, dealing with such societies (30 and 31 Vict. cap. 117), very similar provisions are enacted. The Industrial and Provident Societies Act, 1876 (39 and 40 Vict. cap. 45), which is now in force, contains provisions almost

identical with those of the Friendly Societies Act, 1875, as amended by the Act of 1876, so that it is unnecessary to repeat them here. In the case of Co-operative Societies, of course the enactment deals with shares, not actual money.

The only other class of Society dealt with by the Act of 1883 is that which includes Trades Unions. The power of nomination was granted to members of Trades Unions by the Amendment Act of 1876 (39 and 40 Vict. cap. 22); but the trustees of such societies had not the power, in cases of intestacy, or where there was no nomination, of paying the sum due to the persons entitled to the same without confirmation.

This, then, was how matters stood before the passing of the Act of 1883. By the third section of this Act the sum for which the member of a Friendly or Co-operative Society, or a Trade Union, can nominate a person as ultimate recipient, has been increased from £50 to £100. A similar extension is made as regards the value of estates of deceased depositors which are to be exempt from stamp duty. In fact, wherever in the Acts alluded to above the words £50 occur, they are to be read as if the words £100 were substituted.

The fourth section provides that a nomination may be partly printed, and if made in a book kept at the office shall be taken to be delivered at such office. This provision grants additional facilities for nomination, inasmuch as societies may keep printed forms which will prevent all doubt as to the meaning of the nominator; for simple though the act of nomination really is, it is more than probable that many persons, inspired by the desire of making a "legal document" of it, would so express their intentions as to lead to as great confusion as in the case of the proverbial "testator who makes his own will." A question, however, arises in connection with this section which is not altogether without difficulty. Can a Society or Savings Bank (for, as we shall see immediately, the benefit of the Act is extended to Savings Banks) insist on the precise form of nomination adopted by such society being used by every member exercising his right of nomination? The question is one not unlikely to arise, and we think it must be decided in the negative. The words in the Act relating to the use of printed forms are merely permissive, and it might happen that a member or depositor might wish to keep the fact of his having made a nomination secret until after his death. In this case he might have strong reasons against even applying for a nomination form. Whether a person has a right to make a nomination which is not to be delivered until after his death is a question which we shall consider shortly.

The fifth section of the Act extends the benefits of nomination to depositors in Savings Banks. Any depositor above the age of sixteen may nominate a person to whom the sum due to him by the bank at his death (not exceeding £100) may be paid. The provisions of the section are exactly the same as the corresponding

section in the Friendly Societies Act of 1875 as amended by the Act of 1876. The confirmation of the will of a depositor was formerly, as we have seen, exempt from stamp duty if the value of the estate was under £50; he may now make a will if he likes, dealing with an estate of the value of £100, and confirmation will be exempt from stamp duty. But if the bulk of his estate, as will very frequently be the case, consists only of his deposits in the Savings Bank, he does not need to make a will at all. He has only to nominate the person or persons to whom he wishes the sum at his credit to be paid at his death, and the proportions which each person is to get if there is more than one nominee. Although not expressly stated in this Act, there seems no doubt that the power of the depositor is not limited to nominating one person. Variations of the original nomination are allowed by this section, as well as revocations. If, therefore, a variation is not a revocation, it necessarily follows that there must be a re-disposition of the sum nominated—that is to say, either additional persons are nominated or persons already nominated are struck out, or the sum nominated may be distributed in different proportions. Besides, by Lord Brougham's Interpretation of Statutes Act of 1850, the singular number in all Acts of Parliament is to be held to include the plural.

When dealing with this section we may appropriately consider a question to which we previously incidentally referred. Can a depositor in a Savings Bank, or a member of a registered Friendly or other Society, direct that a nomination by him is not to be delivered till after his death? There is no doubt that delivery of a nomination at the office of the society or bank is essential to its validity. The words of the Act are, "may by writing under his hand, delivered at or sent to the office," etc. There is no particular use, so far as we can see, of the alternative "or sent to" in this clause. If a nomination is sent to the office by the post, it is just as much delivery as if it were handed in by the nominator; in the latter case it is delivered personally, in the former by the hands of the postman. The Act indeed says nothing about personal delivery, and it may be argued that a nomination may be delivered with equal effect after the death of the nominator as before. Against this contention, however, has to be put the fact that until a nomination is delivered it is not valid,—no nomination has in fact been made. A person therefore who keeps a nomination by him may be presumed not to have made up his mind generally as to the disposal of the sum nominated, and this being the case it would be improper to allow delivery of the nomination after his death. Upon the whole, however, seeing that the Act gives no special instructions as to how or when the nomination is to be delivered, it is difficult to see how a bank could object to receive a nomination after the death of the nominator if they were satisfied of the genuineness of the document.

Section 6 extends the provisions of this Act to certain sections of the Friendly Societies Act and the Industrial and Provident Societies Act, to the effect of including under the words, "moneys payable by the society on the death of such member," all moneys due to a deceased member which the society may happen to have in hand, whether as deposits, loans, or shares. No difficulty is likely to arise in the carrying out of these provisions.

Section 7 entitles the "directors" of a Trade Union, in the event of a member having died intestate, and without leaving a nomination unrevoked at his death, to pay any sum—not exceeding £100—due to him, to such person as may appear to the majority of them to be entitled to the same, without confirmation. This provision is taken from the Friendly Societies Act, the word "directors" being equivalent, as we are informed by the interpretation clause (2), to trustees, in cases where there are such officers.

Section 8 grants power to the "directors" of any Society in the case of a member who is illegitimate, and who dies without leaving a will or nomination, to pay the sum which such member might have bequeathed or nominated to or among the person or persons who, in the opinion of the majority of them, would have been entitled to the same had the member been legitimate. If there are no such persons, the deposits (and, we presume, other moneys due to the deceased) shall be dealt with as the Commissioners of the Treasury may direct. A somewhat similar provision was contained in the 46th section of the Savings Banks Acts Amendment Act of 1863; but it was there provided that the authority in writing of the barrister appointed to certify the rules of Savings Banks had first to be obtained. The functions of this officer were, by the Act 39 and 40 Vict. cap. 52, transferred to the Registrar of Friendly Societies so far as regarded certifying rules and deciding disputes; and by a Treasury minute, dated 13th Sept. 1876, the Solicitor to the Treasury comes in place of the said barrister in all matters falling under the 46th section of the Act of 1863. Now, it will be observed, the process of paying the moneys due to a deceased illegitimate depositor is rendered much more simple, the directors having the power to act on their own discretion.

Section 9 provides that the payments made by the directors shall be valid with respect to the demand of any other person claiming through the deceased member against the Society, Savings Bank, or directors: the right of such person to proceed against the person or persons who have actually received the money is, however, reserved. This is an adaptation of a similar provision in the Savings Banks Act, 1863.

Section 10 deals with certain provisions for the prevention of frauds on the revenue. In the first place, it is enacted that if, after deduction of any moneys payable by any society for funeral expenses, the sum at the credit of the deceased exceeds £80, the directors shall, before making payment to a nominee or other person,

require production of a receipt for the succession or legacy duty payable thereon, or a certificate from the Commissioners of Inland Revenue that none such is payable. In the second place, if the whole moveable estate of a member or depositor exceeds £100, any sum paid under the Act without confirmation shall, notwithstanding, be liable to the usual inventory duty.

Section 11 deals with the application of the Act to the Channel Islands.

Having thus glanced at the general scope of the Act as displayed in the several sections, let us briefly consider a few questions which occur to us as not unlikely to arise in the carrying out of the Act.

We have seen that the nominator has power to nominate any number of persons among whom the money due to him, up to the limit assigned by the Act, may be divided. He can also direct the proportion which each nominee is to get. There may be a doubt, however, whether he can nominate a single individual as the sole recipient of the sum nominated, but with instructions to that person to hold the money in trust for, or to pay it over to, third parties. But if we take into consideration the whole tendency of the Act, to which we have referred above, it is obvious that it was the intention of the Legislature to enable persons to do away with the more elaborate process of making a will, by enabling them to name simply the person or persons to whom the moneys due to them were to be payable at their death. This being so, it would appear that any appointment of a nominee to act merely as a trustee or executor would make the instrument more of the nature of a testamentary deed, and might therefore render confirmation of it necessary. In section 5 of the Act there are certain classes of persons named who it is presumed would be most likely to be nominated as the ultimate recipients of moneys due to the deceased nominator; and it is therefore unlikely that it was intended that distribution should be made to them through an executor. On the contrary, it is expressly to save the latter more elaborate process that the present Act is passed. If a depositor in a Savings Bank, whose estate does not amount to more than £100, chooses to make a will in preference to a nomination, he may, of course, do so; but in this case the will must be executed in the ordinary manner, and will be subject to the laws dealing with testaments under the value of £100, to which we have formerly alluded.

Let us consider for a moment the converse of this case. Suppose, say, a depositor in a Savings Bank has deposits amounting to over £100, and he exercises his right of nomination to the full value of his deposits, is such a deed intrinsically invalid, or would it be admitted to confirmation as a will? The legal advisers of the Post Office evidently consider that it would not, as in the forms of nomination which they have drawn up for the use of depositors in Post Office Savings Banks the following note appears: "If the amount due to a depositor at the date of his death (including interest and

stock standing to his credit in the Government Stock Register of the Post Office Savings Bank, and the dividends thereon) exceeds £100, this nomination becomes invalid, and the money is only payable to the executor or administrator of the depositor." Notwithstanding this statement, it is doubtful whether, in Scotland at least, a nomination dealing with sums exceeding £100 would not be admitted to confirmation as a will. It is true that, as Professor Bell says in his *Lectures*, the special province of the testament is to name the executor, and in the nomination under the Act we are considering no such appointment is made; "but such nomination" (of an executor)—we quote Professor Bell's words—"is not essential to render a testamentary conveyance of the moveable estate, or the grant of a legacy, good and available." That is to say, when no executor is named in a testamentary deed, the bequests therein contained may be made perfectly valid by application being made to the Commissary Court for the appointment of an executor-dative. And we see no reason why an executor-dative should not be appointed when the testator expresses his wishes as to the disposal of his moveable estate clearly and distinctly in the form of a nomination—the mere form of words in which he puts his directions does not make any difference. Of course, before a nomination could be confirmed as a will, it would need to fulfil the ordinary requirements as to execution: the deed must either be holograph of the nominator, or duly witnessed in the ordinary course.

As we previously remarked, however, it does not follow from the above that a will which dealt with deposits under the value of £100 would be exempted from confirmation under the Act of 1883. The word "nomination" being used throughout the Act seems expressly to imply that ordinary wills are excluded from its operation, even though they deal solely with the kind of estate referred to in the Act.

A question may possibly arise under this Act as to the comparative validity of a will and a nomination. Would a nomination supersede a previously existing and unrevoked will? The point is one which the Courts will probably be called upon to decide when it does arise, but it is difficult to see how they could refuse to recognise the intentions of the testator when expressed in a perfectly regular, nay, even a statutory form. A nomination, in fact, would probably be treated as a codicil to the will.

The manner in which a nomination is to be executed is the only point which need further claim our attention. The deed is evidently not meant to be a formal one, therefore the more simply it is expressed, consistently with clearness, the better. "I nominate A. B. as the person to whom the entire sum standing at my credit in the Y. Z. Savings Bank is to be payable at my death," is quite sufficient in the case of there being only one nominee. If there are more than one, the different sums or proportions which each is to be paid must be carefully stated. Care must also be taken that

the nominee is not an "officer or servant" of the society, or a director of the bank, unless such official happens to be the husband, wife, father, mother, child, grandchild, brother, sister, nephew, or niece of the nominator. Such near relations are supposed to be the persons amongst whom it would be natural for the nominator to divide the sums conveyed in the nomination. But officials of the society or bank who are not relatives are no doubt presumed to have opportunity of influencing the mind of the nominator in various ways, and are therefore properly excluded. We have already alluded to the form of document, and seen that although printed forms for the nomination may be issued by societies or banks, that circumstance would not probably affect the validity of a nomination made in another form. As regards the necessity for witnesses to the signature of the nominator, it will be observed that the Act says nothing about witnesses, merely stating that the necessary writing must be "under the hand" of the nominator. The Post Office form for nomination contains a space for the signature of one witness, but in all nominations dealing with money in societies or banks in Scotland, it will, at all events, be safest to have two witnesses, whose designations should be added to their subscriptions.

LORD LYNDHURST.¹

FOR how many biographies are the public to be indebted to the late Lord Campbell? Those which he himself wrote are very numerous. He detailed the careers of all the Chancellors and all the Chief Justices. Had he lived and found leisure, he might have given us also the Chief Barons. But not only did he do much in this way himself; he has set agoing a biography-making process which may continue to work for many years to come. He had the knack of offending the relatives, including the remote descendants, of the subjects of his books. Not long ago an enraged Kenyon wrote a life of the first peer who bore that name, with the view of refuting the calumnies of Campbell; and now we have a distinguished book-maker who has been engaged in doing the same thing for Lyndhurst. The work under notice may be as fairly traced to Campbell as if that noble and learned lord had himself penned it. Lord Lyndhurst did not wish his life made public. His family, we are given to understand, would have respected his wishes; but then there was this horrid publication of Lord Campbell's, written in the spirit of Whig malignity, and abounding in inaccuracies and false assertions. After, therefore, years of silence the Lyndhurst family have called to their aid Sir Theodore Martin,

¹ *Life of Lord Lyndhurst.* By Sir Theodore Martin, K.C.B. London: Ray. 1883.

K.C.B., and given to the world the authorized and only genuine memoir of Lord Lyndhurst.

It must be confessed that, although not without its value, this is rather a tiresome work. Lord Lyndhurst himself seems to have destroyed all the materials for a really interesting biography, and gone some way to justify Campbell's recourse to his own imagination. Persons who are indifferent to Lyndhurst's reputation will certainly prefer Campbell to Martin. The latter positively aggravates his readers by a constant reference to the errors and untruths of the former writer. Might the main object of this book not have been more skilfully effected? It exhibits, moreover, a strong political bias and disposition to attribute to his party some of the unfavourable characteristics of Campbell himself.

John Singleton Copley was the son of an American artist. Although born across the Atlantic, his earliest associations must have been connected with England. For when his son was almost an infant, the senior Copley, stimulated by the example of his countryman West, and probably finding that the Americans cared more for politics than art, brought his family to London, where he established himself and obtained no little renown as a painter.

The future Chancellor was educated at a private school and at Trinity College, Cambridge, where he came out second wrangler, having bestowed, it is said, only nine months upon the serious study of mathematics. Being destined for the Bar, he was admitted at Lincoln's Inn in May 1794. After a visit to America, made in connection with some family business, he entered as a pupil of Mr. Tidd, the famous special pleader, with a fellowship from his university to support him during his early professional years. Copley's ambition would hardly have allowed him to remain in the obscurity of special pleading. But his chances of success at the Bar did not seem great. He had serious thoughts of entering the Church, tempted, as so many wholly unqualified men have been, by the fact that his fellowship would in this way be secured to him. But his father prevailed with him to abide in his calling, and actually borrowed money to enable him to start as a full-fledged barrister. It is worthy of note that in this matter of the choice of a profession, the biographies of Campbell and Lyndhurst present a perfect contrast. The worthy minister of Cupar—to whom life in a country manse was the beau ideal of existence—was rendered very unhappy by the refusal of his worldly-minded son to abandon the Bar for the Kirk. Both Campbell and Lyndhurst were utterly unsuited for clerical life, although the one might have become a moderator and the other a bishop. We can imagine how fussy the "Reverend John Campbell, D.D." would have been in 1843, and how he would have bothered the Non-Intrusionists.

Lyndhurst's early professional experiences were such as to make him rather regret that the paternal counsels had prevailed. He

lost his fellowship, and briefs did not come very speedily to supply its place. "Like Romilly," says a writer quoted by Sir Theodore, "Copley was destined to remain a spectator rather than an actor for many weary years before attracting public notice; and I well remember him in the old Court of Common Pleas, always occupying the same seat at the extremity of the second circle of the Bar, without paper or book before him, but looking intently, I had almost said savagely (for his look at this time bore somewhat the appearance of an eagle's), at the Bench before him, watching even the least movement of a witness or other party in the cause, or treasuring up the development of the legal arguments brought forward by the eminent men who then formed the inner circle of the Bar of learned serjeants." This notice touches upon one striking characteristic of Copley—his entire independence of written notes. He could conduct a case, and deliver a most elaborate judgment, trusting simply to his memory, which was so accurate as to retain the minutest details even after the lapse of considerable time.

He seems to have been first brought into notice by a successful objection to an indictment taken at a trial which was attracting public notice. The prisoner was a Luddite—that is to say, one of the leaders in a foolish and ignorant revolt against the improvement of weaving machinery. It turned out that certain parties had been described in the indictment as "proprietors of a silk and cotton lace manufactory," whereas in point of fact they owned both a silk and a cotton lace manufactory. This objection, which even to a Scottish lawyer seems trifling, was sustained, and Copley's client escaped the gallows. The trial took place at Nottingham, at the Assizes. Copley had been meditating a withdrawal from Circuit, as the briefs did not pay his expenses. But his success when it did come was great. He was speedily made a serjeant-at-law. He was junior counsel in the celebrated treason trial of Watson and Thistlewood, a fact which was afterwards quoted to prove that in his earlier days Copley held advanced political views. It is for this purpose of little importance. Prisoners—whatever be the crime laid to their charge—will seek the best counsel they can afford to employ. Copley appears to have been brought into the case through his senior Wetherell, a gentleman, the orthodoxy of whose politics could not be doubted. It is Campbell himself who applies to Copley's argument upon this occasion the happy expression "luminous energy." It was successful in spite of a strong charge from Ellenborough. Of the speech for the defence Sir Theodore says: "There is not in it one superfluous sentence, nor one passage that could be displaced without injury to the effect which the speaker had in view. A finer illustration could scarcely be desired of the '*temperatum dicendi genus*,' which Cicero says is the best kind of eloquence, and which is assuredly the best where the speaker has to persuade a jury of educated men, on whose verdict hangs the life of a fellow-creature. Not a weak point in the

evidence against the prisoner was missed, not a false point taken, not an argument overlooked which could operate in his client's favour."

This defence of Watson excited great attention. The leaders of the Opposition crowded the Court while it proceeded, and, according to Campbell, the Prime Minister himself exhibited much anxiety as to the result. It without doubt brought Copley under the notice of the Government. In those days, as is well known, the leading politicians were on the outlook for talented recruits, for whom it was then easy to find pocket boroughs. "Copley," we are told, "received a message from Lord Liverpool through a common friend, asking whether he would like to come into Parliament." His biographer adds: "The suggestion was made without condition or stipulation of any kind." This is absurd. Of course an invitation from the Government meant an invitation to join them. No stipulation was necessary; a failure to vote steady simply involved the loss of the seat at next election. Copley availed himself of the "suggestion," and was (March 1818) duly returned for Yarmouth in the Isle of Wight at the mature age of forty-six. He is thus one of the few examples of a man entering Parliament at a period comparatively late in life, and yet proving a great success. The great object of the present volume is to refute the charge made against Copley of having ratted at this time for the sake of the loaves and fishes which were certainly dealt out to him. Campbell has brought many a railing accusation, but this is the principal one. That Copley had—up to the date of his being returned to Parliament—been a Radical was an assertion confidently made by more than Campbell, and made over and over again. Whenever made in Copley's hearing, it was, however, indignantly denied, and his accusers seem unable to point to any act, speech, or writing which could identify him in his earlier days with the Radical party. He never seems to have committed himself, whatever opinions he may privately have expressed to his associates. "My noble and learned friend," he said upon one occasion, in the House of Lords, referring to Lord Denman, "has alluded to opinions which, he states, were formerly entertained by me, as a matter of accusation against me; but he has not condescended to adduce a single fact in support of his charge. I have nothing therefore to meet." Upon this unprofitable controversy it is needless to enlarge. It seems to us a pity that it has been revived. Copley remained during the whole of his Parliamentary career a consistent Tory, exhibiting at intervals independence of judgment, as indeed a man of his position could well afford to do.

He became Solicitor-General in 1819 under the Castlereagh Ministry, and in that capacity acted for the Crown at the trial of the Cato Street conspirators. But a still more favourable opportunity for distinguishing himself was afforded in the following year, when he appeared to prosecute the Queen, and found himself

opposed to all the brilliancy and legal talent which the Opposition could muster. The main incidents of this famous trial are well known to our readers—how Brougham surpassed himself in flights of eloquence, and Denman exhibited a zeal which outran his discretion, and rendered him for ever odious to him

“Whose head the likeness of a kingly crown had on.”

Copley's cross-examinations were masterly; and even in this case he seems, when he came to speak, to have done so without notes, although he had necessarily to refer much to evidence. Sir Theodore records one smart reply which he made to Brougham. Brougham had questioned his accuracy, remarking that to interrupt him when he misquoted evidence would be endless. *Copley*: “I should certainly take it as a favour of my learned friend to interrupt me whenever I misstate any fact.” *Brougham*: “We shall be here till midnight.” *Copley*: “I have not misstated a single fact, except that I may have drawn a wrong conclusion from the conduct of my learned friend Mr. Brougham.” Copley's speech in this case lasted nearly two days. The duty which he had to perform must have been a very disagreeable one. Whatever opinion might be held as to the Queen's guilt, there could be no doubt that the party at whose instance these proceedings had been taken was certainly not without sin. Copley seems himself to have formed a strong opinion that the Queen was guilty.

In 1824 he succeeded Gifford as Attorney-General. As a public prosecutor he exhibited, in days when party feeling was very strong, much moderation. Even Campbell credits him with this, and compares him with a predecessor, Sir Vicary Gibbs, who “placed widows and old maids on the floor of the Court of King's Bench to receive sentence for political libels published in newspapers which they had never read, because they received annuities secured on the properties of these newspapers.” At a public dinner in 1839, Lord Brougham described Copley as one who had gone “on the maxim only to prosecute where there was such grave cause as rendered such a proceeding necessary, to shut his eyes when he could, and to administer with mercy the high, responsible, and delicate functions of public prosecutor.” He did not hold this post long; for in September 1826 he became Master of the Rolls, and a few months later was appointed Chancellor in the Ministry of Canning. He entered the House of Lords as Baron Lyndhurst.

The great question of the day was Catholic emancipation, which Canning favoured. Lyndhurst was an anti-Catholic, but a liberty to differ upon this subject was conceded to the various members of the Cabinet. It is said that when he entered upon his new duties there were no fewer than seventy appeals from Scotland alone waiting for hearing, Campbell says: “Copley felt that for him to have attempted to speak *ex cathedra* on the Scotch tenure *a me vel*

de me would only have exposed him to ridicule." Sir Theodore pours contempt upon this statement, and remarks, "in due time he showed he knew all about it." But let the Scottish patriots, who are so enthusiastic at present in their resistance of English legal usurpation, observe this. In order to dispose rapidly of the Scotch arrears, Lyndhurst called in the assistance of two ordinary English judges—the Chief Baron and the Master of the Rolls (Alexander and Leach), who were not peers, and these gentlemen actually for a time superintended the work of the Court of Session. This was encroachment with a vengeance. "Copley's fine presence and bearing," we are told, "never showed to more advantage than when he appeared in his Chancellor's robes. Tall, erect, self-possessed, with a voice deep and rich in cadence, a command of words that came with ease and yet were exquisitely apt, a manner firm, courteous, and dignified without effort, no worthier representative could well be imagined of the great office, which combines in itself the functions of Minister, legislator, and judge." One of his first acts as Chancellor was to procure a silk gown for Campbell, who had lost no time in putting in his claims for that distinction. When it was attempted to do the same thing for Denman, the King's aversion to his very name was found to stand greatly in the way. Denman, as most of our readers are aware, in the course of his speech for the Queen, cited a retort found in Dion Cassius, "to all decent ears unquotable," as Sir Theodore very properly remarks. To whom it was intended to apply was not so clear as its indecency. The King accepted it as having reference to himself, and hated Denman accordingly. The present biographer discusses the question whether Lyndhurst really did all he could for Denman. He of course answers it in the affirmative. It must have been a most disagreeable task combating the royal prejudices, and one might well be excused from attempting it. They were overcome at last, either by Lyndhurst or Wellington (possibly by the united influence of both), and Denman obtained the long-delayed honour.

It is greatly to Lyndhurst's credit that he presented young Macaulay to a Commissionership of Bankruptcy, and Sydney Smith to a canonry at Bristol. But at the same time his very exercise of patronage served as the foundation for accusations. In 1829 he found it necessary in the interests of his reputation to prosecute the *Atlas* newspaper, which had charged him with selling Church appointments, and the *Morning Journal*, which alleged that he appointed Sugden Solicitor-General in return for a loan of £30,000. In both cases he was successful.

The force of circumstances gradually altered Lyndhurst's views upon the Catholic question. The state of Ireland then, as it has done since, quite justified a statesman taking a step to which he was naturally averse. But the Chancellor did not escape the charge of inconsistency, which he met with indignant but dignified

protests. Campbell tells with glee a story of Eldon presenting an anti-Catholic petition from the tailors of Glasgow. "What! do *tailors* trouble themselves with such *measures*?" said the Chancellor in a stage whisper. *Lord Eldon*: "My noble and learned friend might have been aware that *tailors* cannot like *turn-coats*." But this story, Sir Theodore says, relates not to Lyndhurst, but to Lord King. Over the Catholic Bill Lyndhurst and Eldon had certainly more than one fight, the latter resisting to the utmost and to the last any modification of the existing law.

Upon the fall of the Wellington Ministry Lyndhurst found himself with nothing to do, and reduced to his pension as an ex-Chancellor. Campbell suggests that he endeavoured to retain his office under the new Administration. In the case of a man with his pronounced opinions this could hardly have been done with decency; but he did accept a post from the Whigs, becoming, with the approval of both the Duke and Sir Robert Peel, Chief Baron of Exchequer. As a Common Law judge he seems to have proved a great success, both at Westminster and upon Circuit, although Campbell says that "he would not heartily give his mind to judicial business." His wonderful memory enabled him to guide juries without having ever taken a single note of the evidence led before them. A striking instance of his judicial powers was afforded by the case of *Small v. Attwood*, the hearing in which lasted for twenty-one days. After a year's deliberation he gave judgment, and, according to Campbell, "employed a long day in stating complicated facts, in entering into complex calculations, and in correcting the misrepresentations of the counsel on both sides. Never once did he falter or hesitate, and never once was he mistaken in a name, a figure, or a date."

The Reform Bill had in Lyndhurst a vigorous and powerful opponent. The office which he held from the Whigs did not prevent him from doing his utmost to defeat their projects. In the House of Commons one member hinted that "patronage should not be bestowed where it would be requited with perfidy." It is needless to say that the course which he followed was a perfectly just and honourable one. To have purchased his silence would have done little credit either to the Government or to Lyndhurst himself. It may be an anomaly that a judge should be a political partisan; but it is an anomaly which has existed for centuries in England.

It is, however, with regret that we find Lyndhurst, in 1833, opposing not only the details but the principle of Brougham's Local Court Bill, and contending for the necessity of legal administration remaining central. How England could have tolerated so long the absence of tribunals in her midst, where a petty case could be cheaply disposed of, is to us, with our ancient Sheriff Courts, a mystery. But Lyndhurst apparently managed to delay this just measure of reform for thirteen years. He was not always

upon the Conservative side in legal questions, however. He has the credit of having supported reforms in the criminal law; he favoured Lord Cranworth's Divorce Bill, and would even have gone beyond him; and he sought to relieve Dissenters from restrictions which affected their marriages.

Lord Lyndhurst became Chancellor in 1834, and again, for the last time, in 1841. He left office in 1846, but continued for many years to take part in the judicial and other work of the House of Lords. He had a peaceful and happy old age, and died in 1863 in his ninety-second year. The estimates of his character have differed widely. The charges brought against him by Campbell may be summed up in one word—dishonesty. According to that writer, neither his political nor his professional work was honestly performed. He became a Tory for selfish reasons; he neglected the interests of clients and litigants. Campbell's accusations rest upon nothing stronger after all than a mere suspicion, through the desire to save himself trouble. On the other hand, it may be questioned whether he was really the almost perfect man his more recent biographer has described in the volume now before us. This, indeed, all will admit, that he was a great man of the highest abilities, and one who adorned the high office which he held.

THE BELT CASE.

THE case of *Belt v. Lawes* reached its latest, and in all probability its last, stage in the middle of last month. The Court of Appeal altered the decision of the Queen's Bench Division, and upheld in its entirety the verdict which the jury had returned fifteen months before. The case has been as barren a piece of litigation as anything of the kind can well be that has extended over a period of more than two years. It determines no principle, legal or artistic. The only point for which it will ever be referred to in a Court of law is the opinion, not the judgment (for in the view the Court took the question did not require to be decided), of the Master of the Rolls, that where the Court thinks the verdict wrong merely in respect of the amount of damages, the Court may, with the consent of the plaintiff alone, determine the proper amount,—a view of the matter contrary to what had been decided by Lord Denman fifty years ago, and by other judges since. It is not the case itself, but the conduct of the case, which has made it remarkable, and which will make it live in legal annals. To us, in Scotland, the case has an interest only of a secondary kind, but an interest of this kind it has in more than one way. It is always well for us to keep an eye upon any prominent illustration of the system of legal procedure in use in other countries so as to pick up what hints we may for the improvement of our own. Especially is this so in regard to jury trials. Jury trial in civil causes has never

thriven well in Scotland. It has been said we have never been able to hit upon the knack of rightly working the system. It is important, therefore, for us to note how these trials and the proceedings consequent upon them are managed in the country from which this mode of trial has been imported. Further, any leading case illustrative of English modes of procedure has an accidental value at the present time. When the English Courts, somewhat against our will, are endeavouring to conduct our Scottish cases for us, it is natural that we should take an interest in noting how they conduct their own.

A sketch, therefore, of the various stages in the history of this remarkable case will, we think, be of interest and advantage both to lawyers and to laymen.

The alleged libel appeared in *Vanity Fair* in August 1881. It stated that Mr. Belt was "quite incapable of doing any artistic work whatever," that any artistic merit his works possessed was due to his assistants, that "he systematically and falsely claimed to be the author of the works for which he was only the broker," and ended by describing "him as guilty of a very scandalous imposture," and his admirers as "the victims of a monstrous deception." Mr. Lawes in a letter to the Lord Mayor, the chairman of a memorial committee on the look-out for a sculptor, called attention to, and endorsed, these statements. An action for libel was raised in the ensuing winter. The trial before Baron Huddleston and a jury did not begin until June 1882. For obvious reasons, jury trials ought to proceed continuously; but, we presume from the extent of the evidence, this trial was broken off in July and was not resumed until November, by which time the jury must have forgotten much of the evidence they had heard, and must have heard a good deal which was not evidence. More than the counsel must have stood in need of a refresher. The trial, which concerned the simple matter of fact, whether Mr. Belt had systematically palmed off other people's work as his own, lasted in all forty-three days, during which eighty-two witnesses were examined on the one side and fifty-one on the other. A vast amount of interest was excited by the case, which, as Lord Coleridge afterwards remarked, had "convulsed the whole of English society,"—we presume that portion of society which, requiring periodical convulsions to prevent time hanging too heavily upon its hands, is greatly interested one season in whether Mr. Belt's busts are an imposition, and another in whether Mr. Barnum's white elephant is. The trial, it must be admitted, was conducted in a manner adapted to keep up the interest—indeed, fully more so than to try the issue in the case. People can hardly yet have forgotten the interminable digressions, the irrelevancies upon irrelevancies, the little squabbles of counsel, and the compliments that passed between the Bench and the Bar. The Court-room itself was an attraction. The bench was decorated with duchesses

and the table of the Court with busts. No wonder that the trial became one of the exhibitions of the metropolis. One remarkable experiment in evidence was introduced. At the trial of Horne Tooke, a witness having stated that a certain song was sung at a meeting at which he was present, Tooke asked if there was anybody in Court who could sing it so that the jury might judge whether there was anything revolutionary in the air. An experiment of precisely the same kind as that which the clerical humorist proposed in jest was in this case resorted to in earnest. To show that he could execute a bust of artistic merit without assistance, Mr. Belt offered to "sculp" anybody whom the Court might fix on, under such supervision as precluded the possibility of assistance. First the counsel, then the judge were suggested; but finally Pagliati, Mr. Belt's studio assistant, of whom he had already executed a bust, was selected as the subject of the experiment, and accordingly a bust of him was executed in a side-room of the Court. One cannot help thinking that this was about as inept a method of testing a man's artistic powers as could have been devised. So far as an artist's skill is not merely mechanical, so far as the subtle charm of art is concerned, it is a creature of moods and feelings; it does not come when you do call on it, and least of all in the bustle and excitement of a trial—a trial, too, which is a matter of life or death to the artist whose genius is to be put to the test. One might as well ask the Poet-laureate to write a poem, and put him under the charge of the macer while he was doing it, to see whether he was capable of writing *Locksley Hall*. The two Pagliati busts and Pagliati himself were submitted to the scrutiny of the jury, thus in reality making the jury experts as to the artistic skill displayed. Not content with this, a score of Royal Academicians (half a dozen would have done as well) were called, who declared the second bust devoid of artistic merit, and gave a unanimous opinion that the two busts could not have been done by the same hand,—an opinion which, if correct, was conclusive of the case. If the jury were capable of judging of Mr. Belt's artistic merits, why, we ask, call the professional experts? If they were not, why submit to them the materials on which the professional experts had been exercising their skill, and were to give their opinion as evidence? To adopt both of the courses indicated was to encounter this risk, that the jury as amateur experts might come to a different opinion from the professional experts, in which case the jury, as judges of the evidence of opinion, would give the preference to their own evidence—a result which happened. At last the evidence and the summing up of the judge were concluded; but before considering of their verdict, the foreman made a neat little speech to the judge, expressing the satisfaction of the jury at the manner in which his Lordship had conducted the case, and their dissent from the strictures made upon it in the public press,—a

tribute valuable as coming from one who, as he with a tendency to garrulity informed the Court, well remembered the time when Lord Abinger presided in that Court! The jury returned a verdict for the plaintiff, and awarded £5000 of damages. Thereupon commenced proceedings to have a new trial. The main ground was that the judge had misdirected the jury in regard to the professional evidence for the defence, or at least had misappreciated its effect. His Lordship had spoken of the evidence of opinion of the R.A.s, to the effect that Mr. Belt was incapable of executing certain busts, being contradicted by the evidence of persons of repute who swore they had seen him do them, and even give effect to suggestions made to him in their presence. The argument of the defendant was, that this was not irreconcilable with the evidence of the experts, for an unskilled witness might see a sculptor "fingering" or "fiddling with the clay," and yet the true artistic merit be communicated to the bust afterwards by an assistant. The rule was granted in the beginning of 1882, and the motion for a new trial was discussed in May and June. In dealing with the notes of evidence and the summing up at this stage of the proceedings, the rational course is for the counsel to state the points they rely on, and support these by extracts from the evidence and summing up. In the English Courts a different practice prevails. As a preliminary to the discussion the whole of the evidence and the summing up are formally read aloud. In the case of a trial which lasted forty-three days this was a portentous task. The judges set about the dreary farce of reading aloud the 1500 printed pages of evidence. When one judge got exhausted, when the weakness of human nature did prevail, another took up the wondrous tale. In the report, reading such records as this: "At 2.30, seventy-six pages had been accomplished," we are reminded of the reports of pedestrian feats at the Agricultural Hall, recording how many "laps" had been done in a given time. In vain the judges protested that this mechanical reading left no impression on their minds. In vain did they appeal for mercy. The plaintiff's counsel were relentless. On a renewed appeal, it proved that the leading counsel for the plaintiff had gone away, and, "of course," in his absence the second in command could not be expected to undertake the responsibility of foregoing the punishment. In our Scottish Courts the senior counsel present is the leader, and is obliged to take a leader's responsibility. At last the farce was put a stop to. Then came the turn of the counsel at a similar reading of the summing up. This, too, became so dreary that a stop was put to it also. The proceedings on the motion for a new trial, which lasted for sixteen days, were concluded in June. The decision of the Court was given in December last. After six months' consideration, the three judges came to three different opinions. Mr. Justice Manisty thought the verdict quite right; Lord Coleridge thought it quite

wrong; Mr. Justice Denman took a middle, a middling and a rather inconsequent view. His Lordship could not say there had been misdirection, or that the verdict was wrong in the main; but on two matters, the Conway Memorial and the Byron Statue, he thought the plaintiff had failed. In regard to these, the learned judge thought the plaintiff had to some extent acted against the rules of professional honour, and as he therefore did not come into Court with clean hands, he was entitled, not to the full amount of the damages, but only to £500. This was a singular result at which to arrive. The question was, whether the plaintiff had systematically palmed off other people's work as his own. If he had not done this wrong thing, surely it did not matter that he had done some other wrong thing. One might almost as well have reduced the damages because the artist had bilked a cabman or broken a woman's heart. And supposing the defendant had been successful on two points, how did this diminish the falseness of the charge that the plaintiff systematically palmed off other people's work as his own, and that he was incapable of doing any work of artistic merit? Then, if this charge were false, surely the damages to which the plaintiff was entitled was an amount sufficient to compensate the loss to his reputation for artistic skill which the imputation had caused. Lord Coleridge's opinion was a remarkable one. He spoke of the Royal Academy having been put upon its trial, and the case having consequently assumed proportions and an importance incommensurate with the issue which alone it necessarily raised. It is hard upon a plaintiff that the proportions, the importance, and consequently the expense of his case should be swelled out because of the character of the witnesses whom his opponent has chosen to call. His Lordship's view of the character of the evidence of artistic experts was as singular a thing as anything that occurred in the course of this trial, a congeries of singularities: "You might almost as well disbelieve a body of astronomers who tell you that the earth moves and the sun stands still, on the ground that very eminent persons tell you as a fact that they have seen the earth stand still, and the sun rise up in the east and go down in the west, as disbelieve a body of great artists who tell you that the same man did not make two works of art, on the ground that persons very high in the social scale, but with no knowledge or training in art, tell you as a fact that they saw the same man at work upon them." Suppose the work on which the sculptor was engaged never passed out of the custody of the persons very high on the social scale, and consequently that nobody but the sculptor himself could possibly have touched it, would you disbelieve their evidence because the R.A.s said the man could not have executed it? As for the astronomers, we do not believe their statements because they say so; we give our belief to the reasons they present to us for what they say. The Court being of three different minds, the matter was

attempted to be "squared" by a compromise which was not satisfactory to anybody, and which did not represent the view of the majority of the Court. If the plaintiff would consent to take £500 instead of £5000, the verdict would be allowed to stand. The plaintiff did consent. But somebody else claimed a right to be consulted, viz. the defendant. He refused to consent, and argued that without the consent of both parties the Court could not reduce the damages. If the Court thought the verdict wrong, in respect of its giving excessive damages, the Court could order a new trial; but for the judges at their own hand to determine the amount of damages was to usurp the province of the jury. The case was appealed, and, after a hearing of eight days, the Court of Appeal has upheld the verdict of the jury, giving £5000 damages;—the ground of decision being the well-established principle that "the Court has no right to set aside a verdict of a careful and honest jury, unless it is almost demonstrated to be wrong." Somewhat inconsistent with this was a statement of the Master of the Rolls, that if he thought it proved that the plaintiff had smudged the Conway drawing, in order to mislead as to its authorship, he would upset the verdict of the jury in a moment. The circumstance that the plaintiff made a false statement, and played a shabby trick as to a drawing, does not do anything like demonstrating that he had systematically palmed off as his own statues executed by other artists. The costs of these prolonged proceedings regarding a sculptor's squabble must be considerable. For an estimate of these made by Mr. Belt, we are indebted to the enterprising London newspaper, whose specialty is interviewing. Like our old friend "*Pallida Mors*," the *Pall Mall Gazette*, "*æquo pulsat pede pauperum tabernas regumque turres*," and accordingly the day after the Court of Appeal gave its judgment it sent its man to interview Belt, the successful sculptor, and Verheyden, the unlucky "ghost." One of the items of Mr. Belt's information was that the costs on his side alone now amounted to £10,000.

From the sketch we have given of this noted case, we trust our readers may be able to derive many valuable suggestions for the improved conduct of cases in our own Courts. Any member of the general public who may happen to peruse it has had materials presented to him for determining whether, in the manner in which cases are conducted in the English Courts, there is such a marked superiority as regards economy, despatch, business-like aptitude, reasonableness and certainty of result as to compensate for the disadvantages necessarily incident upon cases being conducted at a great distance from home.

MR. BURT'S BILL TO AMEND THE EMPLOYERS' LIABILITY ACT.

THERE are two proposals before Parliament this session for the alteration of the Employers' Liability Act. Mr. Chamberlain, by his Merchant Shipping Bill, proposes to extend the benefits of the Act to a class at present excluded from its operation, viz. seamen; and Mr. Burt, by the Bill defeated last session, and now re-introduced, proposes to increase the benefits which the Act affords to the classes to whom it does apply. It is to the latter Bill we wish to call attention in this notice.

The main alterations of the Act proposed in Mr. Burt's Bill are two: first, to make the Act compulsory; and second, to relax the present hard and fast rule as to notice of the injury.

With the first object in view, the Bill provides that "all the provisions of the Employers' Liability Act, 1880, shall have effect, and be enforced by every Court in every case, notwithstanding any contract or agreement excluding all or any of the provisions of the said Act, or otherwise interfering with the operation thereof." This is a proposal to abolish freedom of contract, and is open to the usual objections to which proposals of this character are exposed. The argument for the proposal is that from the relative position of employers and workmen, the latter being at the mercy of the former, there is at present no real freedom of contract, and that without such a protection to workmen as is proposed they will fail to enjoy those rights which, rightly or wrongly, the Legislature has thought them entitled in the general case to have. There are several instances in recent years in which the Legislature has interfered to prevent freedom of contract where the circumstances of the persons to whom the Act applies are such that without such a provision the intention of the Legislature would be frustrated, and the Act would be found to confer a barren boon. Such provisions are to be found in the Truck Act of 1831, the Ground Game Act of 1880, the Irish Land Laws Act of 1881, and the Agricultural Holdings Acts of last year. In one respect the case of employers and employed is peculiar, and there is much force in the dilatory plea which may be urged on behalf of the employers. The Act of 1880, which so largely increased the liability of employers, is confessedly a compromise and an experiment. Regarding the Act in its relation of a compromise, it is urged that after conceding so much it is hardly fair immediately after the compromise has been effected to reopen the question, and ask the employers to concede more. Regarding it as an experiment, it is urged that the Act was made to terminate in 1887, and it is only fair to wait till the term has expired to see how the experiment has worked.

There is one consideration to which the attention of the repre-

representatives of the workmen in whose interest this measure has been brought forward has not been called. It is this, that absolutely to prevent workmen contracting themselves out of the Employers' Liability Act, as this Bill proposes to do, may be very much to the disadvantage of the workman. The case in which it was decided some two years ago that a workman could contract both himself and his representatives out of the Act, *Griffiths v. Earl of Dudley*, L. R. 9, Q. B. D. 357, is an illustration of what we are adverting to. The men in the Earl of Dudley's employment had a fund called the "Field Box," to which the employer contributed a half, and the total body of the workmen contributed a half. On condition of renouncing all claim to compensation under the Employers' Liability Act, the workmen were entitled to participate in the benefits of this fund. Out of the fund money was paid to the representatives of workmen who were killed even by accident or through the fault of their fellow-workmen, in which cases there would have been no claim under the Act, and also relief was granted in cases of sickness. In cases where compensation would have been got under the Act there was less compensation than would have been got under the Act; but compensation was obtained in cases not contemplated by the Act. In short, less compensation was given in some cases, but there was a larger area of cases in which compensation or relief was given; and on the whole the "Field Box" was a better bargain for the workmen than the Act would have been. The provision in the present Bill would prevent such a compact being made. On the other hand, it is only too easy to figure cases where the unlimited freedom of contracting oneself out of the Act may render the provisions intended by it for the benefit of workmen entirely nugatory. A workman out of employ may be glad to have it on any terms, even on the condition of absolute renunciation of the benefits of the Act, without, as in the "Field Box" case, any equivalent therefor. A modification of the proposed provision might meet the exigencies of the workmen's situation. There would be much to be said in favour of a provision refusing effect to a condition excluding the rights which a workman has under the Act without any equivalent for them. But asking too much, as the present Bill does, there is the risk, almost the certainty, of the workmen failing to get what they might reasonably demand. There is no doubt a provision in the Bill for taking certain equivalents into account in estimating the amount of compensation to be awarded to workmen or their representatives. In determining the amount of compensation payable by an employer under the Act, "the Court shall take into consideration the value of any payment or contribution made by such employer to or for the injured person in respect of his injury, and also the value of any payment or contribution made by such employer to any insurance fund or compensation fund to the extent to which any person who would otherwise be entitled to compensation under

the Act has actually received compensation out of such payment or contribution at the expense of such employer." This provision, however, does not meet such a case as that of the "Field Box"—taking into account, as it does, only compensation equivalent to such compensation as might be claimable *under the Act*. In reference to this provision, it may be observed that it is difficult to see how it is to be made to work. An employer may make a general payment for a number of years into a general fund out of which an injured workman receives compensation. What proportion of the sum received by the workman out of the fund represents the sum paid by the employer into it? An actuary will be required to work out the calculation.

The other provision of the Bill to which we have referred relates to notice. "The Court may . . . at any stage of the proceedings amend any defect in a notice of injury or death, or direct that the action shall proceed and be maintainable, notwithstanding that such notice has not been given duly or at all, if the Court, having regard to the circumstances of the case, thinks just so to direct; and if it appears to the Court that within the time limited by the principal Act for giving such notice, the employer, or his agent or representative, had knowledge or notice of the accident, and of the fact that the workman was injured thereby, or that there has been reasonable excuse for such defect or omission."

The present regulations as to notice are contained in sections 4 and 7 of the Act. Except in case of death, notice of the injury within six weeks of the occurrence of the accident is absolutely necessary to the maintenance of an action. It is only in the case of death that reasonable excuse for not giving notice can be looked at. But there may be cases where it is impossible to give notice of the injury within the time limited, for the simple reason that the injury may not have developed itself within that time. In this respect the Act requires amendment. But it would be a sufficient amendment to provide that reasonable excuse for want of notice should be receivable in all cases whether death ensues or not. The provision of the Bill goes farther—much too far. According to it, the action might go on notwithstanding the want of notice "if the Court should think just so to direct," and if there was within the six weeks *knowledge* on the part of the employer or his representative of the accident and the injury. We deprecate anything encouraging laxity in giving notice. Further, such a provision would have this certain effect, that it would encumber the proof with troublesome and expensive inquiries as to whether the employer or his representative had knowledge, and knowledge within the six weeks. No doubt, besides knowledge on the part of the employer, there is also the condition that the Court should "think it just" to direct that the action should proceed; and it may be said the Court need not think it just unless

there was reasonable excuse for the want of notice. But this is to throw upon the Court the responsibility of an absolute discretion, a thing to be avoided. Besides, from the after mention of "reasonable excuse" as an independent ground for dispensing with notice, it is evident that whatever grounds for the Court "thinking it just" may have been contemplated, "reasonable excuse" is not one of them.

UP-STAIRS AND DOWN-STAIRS TENANTS.

"BIRDS in their little nests agree." So saith the poet. But men living in the same house do not always so. Some of the grievances suffered from the fellow-lodgers and landlords, and the remedies and attempted remedies therefor, are herein treated of.

Sometimes tenants object to noises made by other occupants of the same house, and oftentimes they have to object in vain, and can obtain no redress either against the landlord or their co-tenants. Where the rooms beneath the complainant's were used by another tenant for purposes of a highly immoral nature, and the frequenters thereof by singing immodest songs attracted a noisy crowd of boys in the street, the Court held that this did not amount to an eviction of the complainant, and that he could not insist upon a diminution of the rent because the landlord did not put out the naughty tenant below according to promise (*De Witt v. Pierson*, 112 Mass. 8).

Where one tenant has obtained from the landlord the privilege of erecting a sign in front of the house, other tenants in the same building cannot interfere with number one's privileges. And as according to Mr. Justice Fry, of the Chancery Division of the English High Court of Justice, it is in the nature of sign-boards to creak, the Court will not interfere when the creaking is not in excess of what is naturally incidental to a sign-board (*Snyder v. Hersberg*, 11 Phila. (Pa.) 200; *Moody v. Streggles*, L. R. 12 Ch. Div. 261). It might have been useful if the learned judge had intimated how often a sign-board might, should, or would creak in a day, and in how many notes; the key doubtless would be both high and flat.

About the year 1870 poor Higinson had an infant child—some fifteen months old—which was teething, and consequently sick and fretful. Higinson also had a parlour baby carriage in which, to quiet his darling, he was in the habit of trundling his child up and down his carpeted rooms at divers times by day and by night. An unfortunate Mr. Pool had rooms below those in which the baby ruled supreme, and he objected to lying quietly and impassively beneath the juggernaut wheels of the youthful Higinson, so applying to the Court he asked that the noise might be stopped. Pool failed to show that the noise was made unnecessarily, or that

it was made for any purpose other than soothing the child's sufferings; so the injunction to stop the noise was refused. The Court said that occupants of buildings, where there are other tenants, cannot restrain the others from any use of their own apartments, consistent with good neighbourship, and with a reasonable regard for the comfort of others. "If the rocking of a cradle, the wheeling of a carriage, the whirling of a sewing-machine, or the discord of ill-played music, disturb the inmates of an apartment house, no relief by injunction can be obtained, unless the proof be clear that the noise is unreasonable and made without due regard to the rights and comforts of other occupants." To warrant an interference on the part of the law, the noise must produce actual physical discomfort to a person of ordinary sensibilities, and must have been unreasonably made (18 Alb. L. J. 82; 8 Daly (N. Y.) 113).

Lord Justice Mellish also thought that the noise of neighbour's children in their nursery, as well as the noise of a neighbour's piano, are such noises as men must reasonably expect, and must to a considerable extent put up with (*Ball v. Ray*, L. R. 8 Ch. 471). Probably both Judge Van Hoeson (who decided against poor Pool) and his Lordship were both family men. Suffering humanity, however, will rejoice that both admitted that there was a limit even to the noise that must be endured from children. *Modus in rebus*, as Lord Kenyon would say.

The law of gravitation, which, started Newton thinking by hitting him on the nose with an apple, has frequently proved injurious to tenants occupying lower flats. The question has been frequently discussed whether the landlord, or some person or any person else, is liable for liquids percolating through from upper storeys, and falling upon and so injuring the goods, wares, or merchandise of subservient tenants.

Firstly, let us consider where the landlord can be held responsible because of the rain oozing through or other fluids dropping down. *Carstairs v. Taylor*, L. R. 6 Ex. 223, settles that the landlord is not responsible for the peccadilloes or gnawings of rats (if he does not know of their doings, at all events). Taylor rented to the plaintiff the ground floor of a warehouse in Liverpool for the purpose of storing rice. Nothing special was said as to repairs. Taylor occupied the upper floor. The water from the roof was collected in gutters which terminated in a wooden box, resting on the wall and partly projecting over it in the inside; thence the gutter was discharged by a pipe into the drain. The gutters and box were examined from time to time, and on the 18th of April, when looked at, were found secure, but between that date and the 22nd, a rat or rats wilfully and maliciously—if not feloniously—gnawed, nibbled, bit, and ate a hole in that part of the box which projected on the inside of the wall. On the 22nd Jupiter Pluvius was active, and a heavy storm occurred, and the

collected rain-water passed through the hole into the upper floor of the warehouse, and thence obeying the dictates of nature descended to the ground floor, injuring the plaintiff's rice. The Court of Exchequer held that Taylor was not liable, either on the ground of an implied contract, or on the ground that he had brought the water to the place from which it entered the warehouse. Kelley, C.B., remarked: "Clearly there is no duty on the occupier above, whether he be landlord or only occupier, to guard against an accident of this nature. It is absurd to suppose a duty on him to exclude the possibility of the entrance of rats from without." (*Ex pede Herculem*, verily the learned Chief Baron showed the land of his origin in these last quoted words.) His brother Bramwell evidently thought that he knew the general tactics pursued by these rodents in entering warehouses; he remarked: "It is said that rats can be easily got rid of out of a warehouse, but assuming it to be so, it is no negligence not to take means to get rid of them till there is reason to suppose they are there; and it cannot be said that persons ought to anticipate that rats will enter through the roof by gnawing holes in the gutter."

In Maine it has been held that an action will lie at the suit of a tenant of a store in the lower storey of a building against a landlord, who has the care and control of the upper storeys, for an injury to his goods caused by the rain descending through the roof down upon the store below, if the accident happens through the negligence of the landlord in the management of that part of the building under his control (*Toole v. Becket*, 67 Me. 544; citing *Priest v. Nichols*, 116 Mass. 401). And in New York it was decided that where a landlord, who himself occupied the upper flat, allowed liquids to leak through into his tenant's rooms, he was liable (*Stapenhurst v. Amer. Man. Co.*, 15 Abb. Pr. (N. S.) 355).

In Georgia the Courts considered that the landlord was responsible to the tenant down below for damages arising from the overflow of a bath tub, *et cetera*, in an upper flat, even though the water-works were properly constructed, and another tenant who had access to and a right to use these modern conveniences was the one whose carelessness caused the injury. But the Court said that the decision would have been otherwise had the proprietor shown that the exclusive possession and user of the bath-room had been in a negligent tenant (*Freidenburg v. Jones*, 63 Ga. 612; 66 *id.* 505).

But in Illinois it was decided that a landlord who had not expressly covenanted with his tenant to repair was not liable to pay the damages caused by water, either dirty or clean, coming upon the tenant from above through the carelessness of another tenant or otherwise (*Green v. Hague*, 10 Ill. App. 598; *Mendel v. Fink*, 8 *id.* 378). Nor must he pay if the water-pipe suffers a temporary obstruction, if he sends for the plumber so soon as he knows

that his labours are required. The law is merciful, and requires no man to keep a plumber always on his premises (*Green v. Hague, supra*). And so in New York: there one A. hired the basement and first floor (according to Cis-Atlantic notions) of a building for a bakeshop. The owner entered into an agreement with some builders to make alterations in the upper storeys; the work was negligently done, and A.'s bakeshop was injured by the dust and rain. The owner, however, was not to blame, and the careless acts of the contractors had been contrary to his wish and advice. The Court, when asked to consider the case, gave it as their opinion that the landlord was not liable (*Morton v. Thurber*, 85 N. Y. 550).

Now as to the liability of other persons in this direction. It seems clear that if a housemaid, whose duty it is to keep in order an upper room and attend to the lavatory attached to it and wipe out the basin, uses the basin for her own purposes, and omits to turn off the water so that it floods the rooms of another occupant below, then the master of the said domestic will be liable to the gentleman down-stairs; and that although the master had expressly forbidden his maid using the basin, and had told her never to leave the tap open. This liability attaches to the master because the servant's acts would be incidental to her employment. Per Grove, J., *Stevens v. Woodward*, 6 Q. B. D. 318.

If, however, a law student should go into his master's private lavatory and leave the water-tap running, the solicitor would not be liable for the results. This was decided in the case lastly mentioned, which is a very interesting case, and one that should be carefully studied by all law clerks. The plaintiffs were booksellers occupying the basement of a house, and the defendants a firm of solicitors, who occupied the floor above. Water overflowing from a lavatory in the private room of one of the defendants escaped through the floor to the basement, injuring the bookseller's stock-in-trade. The flooding was caused by a clerk of the solicitors, who, after Woodward had left for the day, had gone into the private room to use the water and had left the tap open. The clerk had no right to use the basin, and no business to go into the room after Woodward had left, and orders to that effect had been given. The jury gave a verdict for £15. When the matter came before the Court, the learned counsel for the plaintiff expressed his views of the daily routine and general practice of law students; and on the other side what was the duty of such necessary members of society was proclaimed. Candy was for the booksellers; he said: "Here the clerk was in the office during working hours, and it was part of the routine of the day's work to wash his hands. It is the general practice for such clerks to wash their hands in the offices where they are employed. That he was forbidden to do so (go into the private room) is irrelevant. He was acting within the scope of his employment (*Venables v. Smith*,

2 Q. B. D. 279). On the other hand, Petheram, Q.C., De Witt, and G. G. Kennedy, remarked in support of the rule for a non-suit, that the principle is well stated in *Whatman v. Pearson*, L. R. 3 C. P. 422. Here the clerk was acting for himself and on his own responsibility. His duty was clearly to keep in his own room, and not to wash his hands in the room of his master. Could it have been said that the master would have been liable if the clerk had washed his hands at some tavern near by during office hours, and had left the tap there running? The Court disposed of the matter by holding that the solicitors were not liable, for that the act of the clerk was not incidental to his employment, and that he was not acting within the scope of his employment. Grove, J., thought he would have come to the same conclusion as that he had arrived at, if there had been no express prohibition in the case, and it had merely been shown that the clerks had a room of their own and a lavatory where they could wash their hands; "then what possible part of the clerk's employment" (he continued) "could it be for him to go into his master's room to use his master's lavatory, and not only the water, but probably his soap and towels solely for his, the clerk's own purpose? What is there in any way incident to his employment as a clerk? I see nothing." His Lordship said it was a very nice question.

We wonder what would have been the decision if the clerk had had no basin of his own, and been about to go into the Chancery Division of the High Court of Justice on office business, and his fingers were soiled with rummaging among dead suits. Would it not then have been within the scope of his employment and duty to wash his hands in his master's basin, using his master's soap and towels, for verily equity requireth a man to come into Court with clean hands.

One Ross (and his partners) occupied a ground floor of a building for business premises, and Fedden the second floor of the same house, each as tenants from year to year. On Fedden's flat there was that necessary of modern civilisation invented by Sir John Harrington, and referred to by him in his celebrated tract called *The Metamorphoses of Ajax*, and he and his had the exclusive use of it, and none others had access thereto. After all parties had closed up on a Saturday evening, water percolated from this private room through the first floor to Ross' premises, causing damage to his stock-in-trade. The overflow of the water was owing to the valve of the supply pipe to the pan having got out of order and failed to close, and the waste-pipe being choked with paper. The defects could not have been detected without examination; the Feddens did not know of them, and had been guilty of no negligence. The matter came before the judges of the Court of Queen's Bench, and they held that Fedden was not liable for the damage, as there was no obligation on him to keep in the water at his peril (*Ross v. Fedden*, L. R. 7 Q. B. 661).

To pass from water to fire. Suppose an up-stairs tenant when he enters into possession finds a stove-pipe hole in his floor, and a pipe passing up through it into the chimney in his room, and that is the way provided by the landlord to enable the tenant below to get rid of the smoke from his fire, and it is necessary for the proper enjoyment by the man down-stairs of his apartments; then the entrant if he makes no special contract does not become the absolute possessor of all the space comprised within the four walls of his holding, but only of that subject to the passage and use of the pipe; he takes his room with easement attached or upper appurtenant, and if he sever, cut, and damage the pipe, and render it unfit for use, so that the smoke from the room below, instead of passing through its proper cylinder into the chimney, escapes from the pipe and fills the room down-stairs, the up-stairs tenant is a wrong-doer and liable for damages (*Culverwell v. Lockington*, 24 C. P. (Ont.) 611).

We find it well established that a tenant on the second flat is entitled to the use of the stairs and passage-way and to the front door; he is not obliged to use either the fire escape or a parachute when he wishes to get in or out of his rooms. Nor is the landlord entitled to lock up at six o'clock, or any other unreasonable hour, or in fact any hour, and refuse to allow the tenant to have a key. This was so held in the case of some lawyers who had their offices on a second storey; and the reason is, that when a party rents to another premises, he impliedly grants all that is indispensable for their free use and full enjoyment. If the landlord thinks it necessary for any particular reason that the street door should be closed and locked at and between particular hours, he should be careful to insert such a stipulation in his lease or agreement (*MacCunanan v. Royal Ins. Co.*, 39 U. C. Rep. 515).

Not only has a tenant of rooms on an upper floor of a house a right of ingress, egress, and regress by the front door, but (unless otherwise agreed) he is entitled to use the knocker and to ring the bell attached to the door; and his visitors also have a right to notify people of their desire for admission in either way they choose, and may do so without any fear of an action of trespass being brought against them, no matter how humble their station, and although (as Lord Abinger remarked) at some houses servants ring the bell, and persons of superior rank knock. And not only has such a tenant the right to use the stairs, but also the banisters thereof, and further, he is entitled to the benefit of the skylight to enable him to see his way up and down stairs. Lord Abinger decided this in 1835. A plaintiff declared to the effect that he was possessed of four rooms in a dwelling-house on Leicester Street, Leicester Square (i.e., as the evidence showed, he had rented two rooms on the first floor and two on the second floor of the defendant's house), by reason whereof he ought to have for himself, his family, friends, and acquaintances, free access

into and out of the said rooms, up and down the stairs and staircase leading to the said rooms, and the benefit of a skylight which before then had lighted the said stairs and staircase, and of a W.C. situated on the first floor of the said dwelling-house, and of the knocker affixed to the street door of the said dwelling-house, and of a bell at the side of the said dwelling-house; yet that the defendant wrongfully bedaubed the banisters of the staircase with filthy and adhesive matter (only tar, as the evidence showed), blocked up the skylight, removed the W.C., took the knocker from the street door, and cut the wire from the bell, whereby the plaintiff suffered immensely. The learned Chief Baron was against the naughty defendant on all these points, and under his direction the jury awarded the plaintiff £50 damages (*Underwood v. Burrows*, 7 C. & P. 26).

The judge was of the opinion that if all these outrageous things had been done to drive the plaintiff away, the defendant might (in order to mitigate damages) have shown that the plaintiff and his family were bad lodgers, and that he did these acts to get rid of them.

In a tenement house the landlord must keep the stairs in order. In a Scotch case a child fell through the railing on the staircase, where a banister was wanting, and was killed; the house was occupied by twelve different families, all of whom had access by this one common stair to the various landings on which were their respective apartments. The Court of Session held that it was the landlord's duty to keep the banisters in repair, and that he could not escape responsibility for the consequences of their being left in a dangerous condition. The owner had to pay damages to the child's father; here, however, the factor in charge of the property had been warned of the state of the railing (*M'Martin v. Hannay*, 10 Court of Sess. Cas. (3rd ser.) 411).

Hedges was the landlord of a house in Red Lion Street, Wapping, which he let out to several tenants, to each of whom he said (in effect if not in words), I let you certain rooms, and if you like to dry your linen on the roof, you may do so; the roof was flat and covered with lead, having a wooden railing on the outer edge, and one got to it through a low door at the stairhead, about two feet from the rail. Ivay, one of the tenants, went on the roof to remove some linen, he slipped against the railing, and it being out of repair (to the landlord's knowledge) gave way and let him down into the courtyard below, whereby he was injured. Lord Coleridge agreed with the County Court judge, and was unable to see any liability on the part of the defendant—the landlord; he said that under the contract the tenant took the place as he found it, if he chose to use the roof he did so *cum onere*. If there had been an absolute contract for the use of the roof in a particular way, it might have been that Hedges would have been liable for not keeping it in a safe condition (*Ivay v. Hedges*, L. R. 9 Q. B. Div. 80).

The plaintiff's counsel did not quote the law of Moses on this point (Deut. xxii. 8), but then on many points the law of Moses does not now hold good in England.

R. VASHON RODGERS, JUN.,
in the Albany Law Journal.

FIFTEENTH REPORT ON THE JUDICIAL STATISTICS OF SCOTLAND, BEING FOR THE YEAR 1882.

THE first table under the head Ordinary Sheriff Courts reports the business under several heads in all the Sheriff Courts throughout Scotland. A separate table distributes the statistics, and attaches them to each of the 55 Sheriff Courts. Of causes initiated prior to and in dependence in the commencement of the year, and causes within the year, we are told that 1448 were in dependence at the commencement of the year, and 8324 initiated during its currency. It is matter of no consequence whether the initiation was by "petition or application." The inquiry is no longer by what door the litigant got access, sufficient that he was now at the bar. Five appear to have obtained access to the Court in some other than the regular mode, and, strange to tell, 4 of these are attached to Dumbarton, and for behoof of these 5 a separate folio column has been provided. It is intended to ascertain the "oldest initiation." For this purpose a net has been spread, commencing in 1869 and extending to 1881, with 11 columns. But as the seniority attached only to one unfortunate captive, the first three columns have no figure within them, and the fifth column has the same result. We do humbly think that this is an expenditure of labour and expense without any possibility of benefit. The year 1874 records the birth of the oldest inhabitant on 27th November, or nearly 10 years in life, and owes its longevity to the Sheriff Court of Jedburgh. The next in the series of antiquity is one in 1876, and another in 1877. The former is placed to the debit of Kirkcudbright, and the latter to Aberdeen. The year 1878 acknowledges 3 suits initiated that year. The year 1879 has 31, which commenced their career in that year, and are still alive. The following year, 1880, has 121, and the year 1881 has the number 1290 on the rolls, making in all 1448 still in litigation in 1882. As might have been expected, the Sheriff Court at Glasgow has 390 causes on its roll at the close of the year 1881; while Edinburgh only returned 136, and Leith 3, in dependence. Kinross appears in the happy state of having only 1 cause in dependence. Twenty-four Sheriff Courts had each less than 10 cases in dependence at the close of the year 1882, whilst Cromarty had not one case in dependence at that time. This fact affords an ample field for conjunction of Sheriff Courts with respect alike to economy and augmentation to the judges, who by such unions have

increased labour and responsibility. During the year 1882 only 32 causes have been transferred to the Ordinary Roll from the Debts Recovery or Small-Debt Court, and 658 from the roll of ministerial business because of opposition entered.

A table gives an analysis of procedure in cases concluded by judgments *in foro* within the year 1882, with the number of causes initiated in each of the 10 years commencing in the year 1872, and for each of the 10 years columns are, as usual, provided, but for three of them no figure has been found to insert. The table is then distributed amongst the 55 Sheriff Courts. The total number of causes in 1882 was 8295, whereof 854 were taken out of Court, 4040 were disposed of by decree in absence, and 3401 by judgments *in foro*. Of these 2438 were by Sheriff-Substitutes, 926 by the Sheriff on appeal, and 37 otherwise by him. It appears that the Sheriff Court at Cromarty had only 10 causes, all of which were disposed of by decrees in absence. No fewer than 31 Courts had less than 10 appeals to the Sheriff. The Sheriff Court at Kinross had only one such appeal, Glasgow had 248, and Edinburgh 102. As formerly mentioned, the one ancient case decided in 1882 was initiated in 1874, and was claimed by the Sheriff Court at Jedburgh.

A tell-tale or inquisitorial table is entitled "*Time occupied (?) by judgments of Sheriff-Substitutes of cases ended within the year*" (1882). This table is spread so as to embrace 57 weeks, which appears to be the greatest latitude allowed the Sheriff-Substitute for his "occupation" at avizandum. It is not easy to perceive how this extended net has been thus spread, for the 11 columns laid in the range have no cases. The first column which makes any response is 15 weeks, and is attached to the Court at Inveraray, which reports another cause under the column of 12 weeks, and has, however, the consolation of being then in company with 2 causes from Inverness and 2 from Wigtown. Of 3364 judgments, no fewer than 2931 were given within "one week and under, of which 1014 were in the Glasgow Court, and 292 in the Court of Edinburgh." The columns for two and three weeks give evidence of dispatch, and it is not until the fourth week that this crucial table shows symptoms of languor. Subsequent weeks give each an occasional unit, until, as has been said, that with 15 weeks the whole inquiry is satisfied, leaving the 11 remaining columns, so unnecessarily spread, completely void.

A table reports the number of appeals during the year (1882). These amounted in all to 1178 on 3401 causes. In 1019 there were one or more appeals, and in 2382 there was no appeal. There were 887 causes in which there was one appeal, 112 causes in which there were two, 14 where there were three, 5 where there were four, and 1 in which there were five, and that unique case was in the Glasgow Court. In 926 interlocutors appealed, the Sheriff sustained 744 (not appeals, as stated in the report); 189 interlocutors were reversed, and 63 had "mixed judgments."

That equal justice may be done to the principal Sheriffs and their Substitutes another table is spread to receive details of the "number of weeks between Sheriffs' possession (?) of completed cause and date of judgment." The net is spread for 44 weeks, that for the Substitutes being graciously extended to 57 weeks, but several of the columns applicable to the Sheriffs—as is the case with that for the Substitutes—are left blank, the greatest length of time being 25 weeks of possession (?), in a case from Glasgow, where the Sheriff is resident; and another cause appears under the column of 19 weeks from the same Court, whilst another cause appeared in the column of 20 weeks in the Court at Inverness.

No fewer than 692 had judgments by the Sheriff within "one week and under," whereof 233 were in Glasgow and 102 in Edinburgh. It appears delay commences on the fourth week, and only one cause, already mentioned, appears to have taken 25 weeks before judgment was given. Several other points are contained in the tables of little or no importance, such as where "further papers ordered," or "hearing ordered," or "neither papers nor hearing ordered." Under the first column 173 papers were ordered, 738 hearings were ordered, and 15 where neither papers nor hearing were ordered. Five of this last class appear under the Bankruptcy Court. Tables are given for cases in bankruptcy and for applications under the Poor Law for expenses for the process of *cessio*. Under the former 417 sequestrations were issued in 1882—107 from the Sheriff Court in Glasgow, 94 in Edinburgh, 27 in Inverness, and 10 in Dundee. Forty-two competitions for trusteeship and 184 bankrupts discharged. Under the Poor Law, 644 applications were made—330 for relief, 170 for warrants to remove paupers, 124 "punishments" (prosecutions ?) for desertion of wife or family. A table distributes the administrative and miscellaneous business amongst the 55 Sheriff Courts, but which can be of little general interest, but must have cost no small trouble to officials, and expense in tabulating and publishing.

The report now enters on the department of the Sheriff Court called the "Debts Recovery Court." The name is somewhat anomalous, as this department does not form a *separate* Court, all the Sheriff's varied functions being for the recovery of debts or redress of wrongs. This department intervenes between the Sheriff's Ordinary Court and his Small-Debt Court, which is limited to debts not exceeding £12. This secondary stage extends from £12 to £50, and has a very peculiar formula. It is founded on the Scots Act which introduced the triennial prescription, but in practice has received some extension. The formula is also anomalous. It is a legal hybrid, borrowed partly from the Small-Debt Court and partly from the procedure in the Ordinary Court, and partly from neither. The summons is nearly uniform with that of small debts; but on coming into Court the usual procedure is reversed, and the defender has *first* to state his defences, and the

pursuer then to answer. The record is not made up by condescendence and defences, but by what is termed *pleas* written by the Sheriff. No record is formally closed. The proof may be either recorded if desired, or this may be dispensed with by the parties. An appeal is open to the Sheriff, who may or may not hear parties; but where there is no record of evidence, he has no material whereon to judge of *facts*. The Act sprang from an amateur. It is ascribed to Mr. Harrison, the present Lord Provost of Edinburgh, who was a member of the Law Courts Commission, presided over by Lord Colonsay. Although the Act may be somewhat inconvenient and difficult to work, it has been greatly taken advantage of by the trading community, and in general leniently dealt with by Sheriffs, and on the whole has been a success in legislation.

The five tables under this branch are as usual retrospective, being first a "Comparative Table of the Business in the Sheriffs' Debt Recovery Courts" in the five years 1878-1882 inclusive.

	1878.	1879.	1880.	1881.	1882.
1. Number of cases initiated in the year, or previously depending,	6744	6540	5918	5469	5470
<i>Note.</i> —We are not aware how a case in this Roll can be reopened or revived.					
2. Disposed of causes by decree, .	4774	4758	4227	3883	3829
In absence,	2975	2962	2752	2483	2416
<i>In foro</i> ,	1799	1796	1475	1400	1413
Decrees <i>in foro</i> for—					
Pursuers,	1050	1041	821	736	783
Defenders,	804	823	252	258	267
<i>Note.</i> —We do not understand how decrees can be given otherwise than in absence or <i>in foro</i> . The case may be given up when no decree can be given, and the same remark applies to decrees otherwise than <i>in foro</i> . A decree can only be given under the one or other denomination.					
Reponings either at the instance of the pursuer or defender are very few. Both included are,	118	130	80	64	84
The great part of decrees <i>in foro</i> were given by Sheriff-Substitutes, and are separately stated in the Report.					
Appeals to the Sheriff,	242	281	195	218	189
Whereof approved,	162	195	135	172	2
Altered,	55	60	42	21	144
Withdrawn,	6	7	2	5	27
Appeals to the Court of Session, .	4	8	2	4	8
Cases conducted by agents separately stated, and chiefly for pursuer—for both parties, . .	1148	1104	951	1027	991
Debts claimed by pursuers (distinguished decrees in absence and <i>in foro</i> , the largest being the former), parts of pounds being here omitted,	£106,134	£103,799	£91,101	£84,322	£84,436
Total fees received,	1,218	1,134	1,034	981	974
Costs awarded during the year, distinguishing in favour of pursuer and defender. The total costs awarded were,	4,800	4,825	4,030	3,916	3,887

A number of other figures are given under separate heads, which can be of no general interest. For example, (1) it is reported what amount of debts claimed has been decerned for in absence, and what by decrees *in foro*; (2) what amount of debts claimed have been decerned for and what not decerned for (decrees in absence are here included); (3) decrees allowing full claim, decrees allowing partial claim, or otherwise (?); (4) debts claimed but not decerned for, by disallowing the whole or disallowing a part; (5) decrees allowing full claim in absence or *in foro*; (6) decrees disallowing the whole in absence or *in foro*; (7) amount carried by "reversals or alterations on appeal to the Sheriff"—in favour of the pursuer, in favour of the defender. Much trouble and cost must have been occasioned by the ascertainment of these most minute particulars, and it is obvious the results can be of no possible utility, and might be avoided in future. In this department and that of small debts the sums claimed are given, even to fractions. But in the Sheriff Ordinary Court this is not given. It may be said that in that department there are cases of interdict and *ad factum præstandum* without any pecuniary conclusion; but in such cases, as is the rule as to costs, £25 might be properly assumed as the value in each case. It is of great importance to approximate as to the gross amount entertained by the Sheriff in his Ordinary Court, which on this principle might be easily ascertained.

Other tables distribute the Debts Recovery cases amongst the 84 Courts, including the district Small-Debt Courts in some counties, but which are not suited for procedure in such cases. The first table gives "Causes in dependence at the commencement of the year," being 205 causes, 63 belonging to Glasgow; "Primary enrolments within the year;" "Number of causes in which no proceedings during the previous year, but revived by re-enrolment within the year." For this wholly unauthorized procedure the column set apart for the figures has only one entry, being 9, apparently unknown anywhere save Edinburgh, which thus monopolises the whole column. "Total causes before each of the 84 Courts," three of which report no causes, but whose names appear in the table, all in the county of Ayr; 44 Courts had less than 20 causes within the year, 4 Courts had only one single cause, and several had less than 10. The table proceeds to give the disposal of the causes, whether by decree or otherwise than by decree. A column has the strange heading, "Causes in which no proceedings within the year and taken off the roll, amounting to 43, of which 22 belonged to Glasgow." 191 causes were in dependence at the end of the year, 74 of which are attached to Glasgow. The table following the general table distributes among the Courts the total amount of debts, the greater being under Glasgow, £19,853. The lowest is in Lennoxton, Stirlingshire (a district Court), £15, 16s. 11d. Some Courts, however, had very few cases under this branch. The table proceeds with their dis-

posals in the various Courts, whether by decree in absence or *in foro*, allowing "full claim" or "partial claim or otherwise" (?). Two northern Courts only have this strange decree, neither allowing the full nor partial claim. These are Banff and Elgin. The table proceeds with "Decrees allowing the whole" or "allowing part," and the full amount allowed by decrees in absence and *in foro*. Then the numbers are stated where the claim has been "wholly disallowed by decrees in absence or *in foro*," with the sums so allowed or disallowed, and the number of cases where this mode of disposal was adopted or "otherwise;" no less than 483 are despatched in this easy off-way without decrees. A table is prepared for reponings of decree in absence, but several of the columns remain empty, and one with only two figures—"costs awarded in cases extracted." Under this head three columns are appropriated for those "in favour of the pursuers," "against pursuers," and "otherwise." Under this last column only one entry is attached of £8, 7s. 7d. under the Court at Glasgow. Surely this may show that the inquiry is wholly unnecessary and useless. Many of the columns are blank, and several with few figures—one with only a single sum. We trust that before another annual report it will be seriously considered whether the inquiries may not be curtailed and limited to points really essential and useful to be made known.

The report now enters on the "Sheriff Small-Debt Court," whose jurisdiction extends to £12; the "Debts Recovery Act," for recovery of "certain debts" up to £50, intervenes between the Sheriff's Ordinary and Small-Debt Court. It has been suggested that all debts might be brought into Court in the same initial form, and at the first calling decree would be given in absence. But if there exists opposition, the case ought to be transferred to one or other of the three departments, according to the value of the debt, and as best suited for cheap and speedy ascertainment and decision. As usual with the other departments, the tables commence with a "Retrospective Table of the Business in the Sheriff's Small-Debt Court from 1878 to 1882" inclusive:—

	1878.	1879.	1880.	1881.	1882.
1. Number of causes before the Court within the year and in dependence at its commencement,	57,336	58,516	61,257	56,163	54,874
2. Disposed by decree in absence, <i>In foro</i> ,	33,700	33,348	36,622	32,283	32,051
3. Cases conducted by agents (distinguishing whether for pursuer or defender or for both), the last only here given,	12,031	11,794	12,093	11,060	10,776
4. Total debts claimed by pursuer in causes decided by decree (distinguishing decree) in absence and <i>in foro</i> ,	13,768	15,602	16,359	14,734	13,821
	£205,988	£212,160	£210,976	£187,986	£186,086

	1878.	1879.	1880.	1881.	1882.
5. Total fees received, . . .	£7,589	£7,691	£7,832	£7,186	£7,073
6. Costs awarded during the year (distinguishing for pursuer or defender or otherwise)—total for both,	12,687	13,704	13,558	12,315	12,177

There are some other figures which, as with the previous tables, are of no practical utility, such as "allowing the whole claim" or a "part," and similar points, which must have cost great trouble and expense, if indeed such facts can be ascertained with accuracy, which is much doubted.

The general table is followed by three other tables distributing the various points and figures amongst the 110 places in which Small-Debt Courts are held. The number of sittings of the Court at the ordinary seats of the Court and districts was 2489. The greatest number of causes are, of course, in the principal seats of the Court. It appears that no fewer than 11 district Courts had less than twenty cases during the whole year; some had only three or four, and five Courts had no cases to decide. In one district the sums for decision were only £15, 13s. 3d., and in another £11, 4s. 3d. Many district Courts had less than £100 to decide during the whole year. One important matter appears in one of these tables which does not appear in the general table, namely, "sales" under decree—the *only* mode of recovery now existing. It may be asked why this important result is withheld from the tables dealing with the Sheriffs' Ordinary and Debts Recovery Courts. Though perhaps not so easy of attainment as in the Small-Debt Department, yet the results would be more important. It appears that in the Sheriff's Small-Debt Court 53,838 decrees for sums amounting to £186,086 were issued during the year 1882, but only 305 sales were reported on decrees for debts of the *cumulo* value of £1683, with expenses. The free proceeds of the total sales was £1321—the expenses of pouncing and sales were £333, leaving a total surplus of £60. The total fees received were £7073. These figures afford much material for reflection on the question whether the absolute abolition of imprisonment for civil debt has been of public advantage. About sixty Courts appear to have no return of sales, and several had only one or two during the whole year. This establishes that the decrees were mere dead letters, or wholly inoperative. By an Act of Parliament the Sheriff-Principal is obliged to attend one Small-Debt Court during each year at every place where held. The advantage of this regulation is not very apparent, there being no record for appeal in Small-Debt cases, and the change of judge incident to this arrangement obviously disturbs the continuity of the cases. It is remarkable that in the excessive scrupulosity in these statistics to tabulate every point, however insignificant and immaterial, this point has been omitted, and no column set apart for the statutory attendance of the Sheriff, although in many instances it might have remained void.

Correspondence.

LEGAL EDUCATION IN SCOTLAND.

(To the Editor of the Journal of Jurisprudence.)

SIR,—The review of my book on “The Law Agents Act, 1873” touches so many points of interest in connection with the education of law students that you will perhaps allow me to again direct the attention of your readers to the subject. It may be considered under two heads, viz. (1) Legal Education; (2) General Education.

As regards *Legal Education*, the examinations conducted by the examiners under the 1873 Act are, I think, admitted to be as sufficient a test of legal knowledge as is either desirable or possible. I am far from suggesting that any university examination would necessarily be more satisfactory. The means of ascertaining the *General knowledge* of students who are neither graduates in Law nor in Arts is, it seems to me, the defective part of the system.

There is a well-educated class whose case the present regulations exactly suit. But that class is very limited; it is chiefly composed of sons of solicitors of means and standing, of young men who have had abundant opportunities of liberal education, and to whom the cachet of a degree is a matter of no importance. So far as they are concerned, the present regulations may be looked upon as quite sufficient. Whether they become lawyers or not, they would almost certainly spend a year or two at a university. I cannot see, however, that it would be any hardship to them to have to pass the present second general knowledge examination, as well as attend such of the Arts classes as they may choose.

The administrators of the Act of 1873 have to do but little with this class. The great majority of law students do not spring from the legal stock of the country; many of them have at the beginning of their career very small means, and very few opportunities of liberal education. They spend the best hours of the best years of their youth in the drudgery of junior office work. If they live in the country, it is impossible for them to attend university classes during their apprenticeship; they must face the general knowledge examination in Edinburgh. It is not very hard, and it is no proof of a man's thorough education that he has passed such examination; but it seems to me only fair that the test imposed by it should be undergone not only by the son of Lazarus, but also by the son of Dives. Let this examination be compulsory upon *all*.

Every law student in Scotland must sooner or later matriculate at a university in order that the prescribed law classes may be attended. Might not this opportunity be taken to require the law student to attend (in special summer classes or otherwise) certain Arts classes,—allowing him to select his own classes from a range

possibly more liberal than that presently afforded by the Arts faculty. It is not necessary that attendance at those classes should be followed by compulsory examination. "Examination is not the object of education." I contend that whether followed by examination or not, attendance at Arts classes should be absolutely requisite for a law student. The universities might co-operate with the law examiners in this matter in the institution of a new degree in Arts or Law,—such as I have suggested on p. 48 of the treatise you reviewed. The conditions of the degree of B.L. are too lax; those of the degree of LL.B. are too severe. At all events, I believe that any system of legal training which does not make a truly liberal general education a necessity is incomplete, tending to deteriorate the legal class, and to imperil the confidence of the people of Scotland in Scots law and Scottish lawyers.

The two points which I regard as important are, (1) that the conditions of education should be the same to all classes, to rich and poor; and (2) that the general education of law students should not only be liberal, but be as intimately associated with the Arts faculty of Scottish universities as their legal education is with the Law faculty.—I am, etc.,

WILLIAM GEORGE BLACK.

GLASGOW, March 17.

WORKING OF THE LAW AGENTS ACT.

(To the Editor of the Journal of Jurisprudence.)

SIR,—I notice in the correspondence column of your March number a letter signed "Practitioner," in regard to the working of the Law Agents Act, and the sharing of fees between town and county agents thereby legalized. Personally I have never asked my Edinburgh correspondent to share his fees with me, and have no intention of doing so; but, at same time, I fail to see the injustice of such an arrangement, which evidently burns into the brain of "Practitioner." He no doubt expresses his own views, and probably also those of Edinburgh agents in general, when he says that the country agent "does nothing;" but it might be well if your readers had before them the opinion of country solicitors upon this matter. They think that they have to do a good share of the work embraced in the strictly "judicial" fees, and that the Edinburgh folk (who get these fees) often act somewhat the part of light-porters between them and counsel. I do not say that this view is more correct or less onesided than the former. Probably the truth lies somewhere between the two extremes, and if so, the arrangement authorized by the Law Agents Act would not appear to be so far off the mark after all.—I am, etc.,

COUNTRY PRACTITIONER.

13th March 1884.

Reviews.

Outlines of Roman Law: For the Use of Students. By T. WHITCOMBE GREENE, B.C.L. Fourth Edition. London: Stevens. 1884.

THIS is an excellent little work of its kind; but the kind of work is one to which the attribute of excellence cannot be granted without some qualification. It is a contribution to the literature of "cram." The importance and widespread prevalence of the system of competitive examination have called into existence a didactic literature of abstracts, *précis* and summaries, of which the work before us is a good example. This literature is designed as a stepping-stone towards the ideal, not of the scholarly searcher after truth of fact or principle, but of the average competitive examinee. Now, the ideal of the average competitive examinee is a maximum of marks combined with a minimum of mental labour, and the manuals compiled for his benefit keep this in view by presenting in the smallest possible compass those elements of the subject of study which experience has found turning up in an interrogatory form in examination papers; and the law student, instead of trusting to the healthy nourishment supplied by original texts and learned commentaries, is apt to rely on what these works afford—an artificial fattening of the legal liver. It may therefore be urged against this kind of literature, that it puts a premium upon quick, though superficial study, and sets the sounder, if less brilliant, qualifications of careful thought and patient plodding at a discount.

There is, of course, another side to the question. It cannot be denied that a good abstract or summary is an effective aid even to the most conscientious student of so vast and intricate a subject as the civil law. The answer to this is that such an abstract, to be of real effect, must be made by each student for himself, or there is the obvious danger that he will master only an abstract, and know nothing of the more solid body of doctrine from which the abstract is made up. Then, again, it may be urged that the institutional texts of Gaius and Justinian are in themselves mere elementary summaries of the *Corpus Juris*, and that an analysis of these sins by over-refinement. But, if the necessity of such a work as these "Outlines" is once admitted,—and, to tell the truth, the book seems to have emphatically justified its existence by attaining a fourth edition,—then nothing but praise can be given for the thorough way in which the work has been done. The author has condensed the doctrines of Gaius and Justinian into two hundred small and widely-printed pages; an analytical table presents at the outset a general conspectus of the subject; a brief introduction reviews the history of Roman law; an appendix of passages from Gibbon shows some of the skeletons of the texts clothed with flesh; a few well-chosen notes illustrate the main subject by

quotations from ancient poets or modern civilians ; and an exhaustive index affords a means of ready reference. Everything that can assist the memory is here present—brevity, clearness, logical division and subdivision, appropriate marking of headings by numerals typographically distinguished.

Scottish students who feel themselves in need of such an aid as this may be reminded that there is no such work published in Scotland, though the use of such a work was, if we remember aright, superseded by the publication of Professor Muirhead's *Gaius*. The discursive index to that work at once acquired a probably unexpected reputation in the eyes of the average competitive examinee as "a splendid tip for Exams."

A Treatise on the Rights and Burdens incident to the Ownership of Lands and other Heritages in Scotland. By JOHN RANKINE, M.A., Advocate. Second Edition. W. Blackwood & Sons. 1884.

WHEN the first edition of this treatise appeared in 1879, surprise was frequently expressed that the large and attractive field of legal science which it covers should have remained so long unappropriated. But it soon came to be recognised that it was a happy destiny which had reserved for Mr. Rankine the opportunity of making this field his own by right of occupation. In this, more perhaps than in any other department of the municipal law, the governing principles are those of pure reason and equity. It is refreshing to light upon a region which has enjoyed so large immunity from the legislative ardour of the age. Many statutory matters, it is true, such as the laws relating to game, to salmon fishings, and to entails, fall within the comprehensive range of this work. But in the main, the rights and duties of an owner of lands in Scotland are determined on principles which are elementary and common to all legal systems.

The adequate exposition, therefore, of this branch of the law obviously calls for more than the ordinary qualifications of a legal book-maker. The work before us gives evidence in every chapter that the author nowise underrated the requirements of the task which he undertook ; and the fact that so elaborate and systematic a treatise has already made its way to a second edition is in itself a signal mark of the success of his enterprise. The book has rapidly won for itself an honourable and, we believe, a lasting place in our legal literature. Its immediate popularity has been justly earned by the fulness and accuracy of its information as to the existing law, and by the skill with which that information is presented in serviceable shape. But its permanent value rests chiefly, in our view, on the scientific method with which Mr. Rankine has deduced his system from the first principles of jurisprudence and of common sense. Lord Stair, in the dedication of his great work, says : "There is not much here asserted on mere

authority, or imposed for no other reason but *quia majoribus placuerunt*; but the rational motives, inductive of the several laws and customs, are therewith set forth." These words go far to explain the abiding value of Lord Stair's work; and, without putting Mr. Rankine's treatise on the same level with that incomparable classic, we believe that few modern legal writers have so consistently adhered to the principle expressed in the words we have quoted. Closely connected with the author's success in this respect, is the assistance which he has derived from the civil law of Rome. We know no book which better exemplifies the practical value to a modern jurist of a thorough mastery of the Roman law, not only as a storehouse of illustration and analogy, but as a guide to true conception of legal principles, and to precision of method in applying them. Starting thus from the very *fontes juris*, our author is further aided in his exposition by an extensive acquaintance with the modern British and Continental schools of jurisprudence, and with the results of recent historical research, as applied to ancient forms of property. One instance of the latter is worth noting. The theory which, until quite recently, has prevailed in regard to the origin of rights of common, presupposes in every case the anterior existence, in early times, of a right of property in some ancient lord, from whom the right of common was derived by grant, express or implied. In the introduction to his chapter on Common, which summarizes the successive phases of landownership in our own history, Mr. Rankine shows that this theory is a fiction, and precisely the reverse of the truth. Modern investigation has proved that rights of common are traceable to an era "when there was no such right as individual ownership in any part of the soil," when "the only landholder was a community massed in a village by the chance of war, the necessity of mutual protection, and the scarcity of food caused by increase of population." We observe that Mr. Frederick Pollock, in his recently published *Manual of the English Land Laws*, while pronouncing the exploded "theory of the law books" (as applied in particular to village greens, which are a remnant of old unappropriated common land) to be a mere fiction, the "historical futility" of which has been more than once admitted from the Bench, is yet obliged to add that "it is now hardly possibly to break with it altogether for legal purposes." It is satisfactory to find that Mr. Rankine, in expounding the law of Scotland, lies stretched upon no such bed of Procrustes.

In these remarks we have given prominence to the scientific ability displayed in this work; but we must add that it is kept strictly subservient to practical ends. The book is, in fact, an eminently practical one. The subject offers many inducements to abstract speculation, but the author is never tempted into any dissertation that has no bearing on the actual state of the law. We have only noticed one instance in which he suggests any

amendment of the law, viz. when he asks (in a footnote) why liferenters of lands in Scotland should not have powers similar to those of entailed proprietors, or to those which have recently been conferred by statute on tenants in tail and tenants for life in England. We have no space, however, to enter with any detail into the practical merits of this treatise, and they are too well known to require any recommendation. The present edition, besides being carefully brought down to date, is enriched with a largely increased number of citations from the English and American reports; and Mr. Rankine has used the requisite caution and discrimination in pointing out how far the English authorities may safely be used as guides. In many instances valuable aid has been derived from the decisions of the English Courts. In the law of nuisance, for example, the plea of "coming to the nuisance," which both Bell and Blackstone sustain as a valid defence, has been repelled in recent English cases, on grounds which Mr. Rankine holds on principle to be conclusive; and one cannot doubt that our Courts would now decide to the same effect. On some points, however, owing to a difference of theory between the two systems, the English decisions are unavailable to the Scotch lawyer, and apt to mislead. With us, for example, a pheasant shot by a poacher becomes his property at common law, on the principle *res nullius fit occupantis*; and even the owner of the land on which it was taken cannot legally seize it. In England, on the contrary (we quote Mr. Rankine, p. 130), "the theory is that a title to property created merely by occupation necessarily implies that the act of occupation is not of a wrongful nature; and capture by a trespasser does not create a title of property in him, but converts that which before was a qualified or special right of property, in the person of the owner of the land where the capture took place, into absolute property in him." Again, although in both countries the *solum* of a public highway belongs, in the general case, to the owner of the lands through which it runs, the law as to trespass on a highway differs. For in Scotland it has been laid down that "it is impossible that any one can unlawfully enter upon the public road for the purpose of killing game, or for any other purpose;" whereas the English law, which Mr. Rankine thinks more logical in this respect, holds that "a person using a highway otherwise than for the purpose of passing and repassing over and along it is a trespasser."

The doctrine of the constitution of servitudes by implied grant ("easements on severance") is one of great delicacy, and has given rise to much fluctuation of opinion. Servitudes arise in this way when the owner of two neighbouring tenements conveys away one and retains the other, or conveys both to different persons, provided a servitude over one of the tenements is either absolutely necessary to the enjoyment of the other, or at all events is necessary for the convenient and comfortable enjoyment of the

other. When there is absolute necessity, the law is clear. But when the servitude is only necessary for the comfortable enjoyment, difficult questions arise. Such servitudes must be apparent, that is, such as may be seen or known on careful inspection by a person ordinarily conversant with the subject. Must they also be continuous? Mr. Rankine says (p. 361): "It can scarcely be said that continuity has been strictly demanded either in Scotland or in England. In the case of a right of way, it seems to be enough if an artificially formed and constructed passage exists to, and for the apparent use of, the dominant tenement." This may be true as to Scotland, though the decision founded on was confessedly a narrow one. But we can hardly agree with Mr. Rankine's construction of the English decisions on the point. The statement which is generally accepted as authoritative is that of Chief Justice Eyre in *Polden v. Bastard*, to the following effect: "There is a distinction between easements such as a right of way, or easements used from time to time, and easements of necessity, or continuous easements. The cases recognise this distinction, and it is clear law that upon a severance of tenements, easements as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time, they do not pass, unless the owner, by appropriate language, shows an intention that they should pass." The leading case cited by Mr. Rankine in support of his statement is that of *Watts v. Kelman*; but in that case the Lords Justices expressly homologated Chief Justice Eyre's *dictum*, and applied it to the easement in question, which they held to be clearly a continuous one. We see no reason, therefore, to doubt that, in England at all events, continuity, as well as apparency, is requisite to the constitution of a servitude by implied grant; and as the law of England has been authoritatively declared to be identical with our own in this matter, its ascertainment cannot but be of practical moment. Another point in connection with this subject of implied grant has occasioned a remarkable oscillation of opinion among the English judges. Suppose that A. owns two adjoining houses, and that the higher of these houses enjoys the use of a drain which passes under the lower. Suppose further, that A. conveys first the lower tenement to B., and subsequently the higher tenement to C., without mention of the servitude in either case. Is C. entitled to use the drain, as it was used at the time when B. acquired his house? This question arose in the case of *Pyer v. Carter*, and was decided in the affirmative, on the ground that a house is purchased "such as it is." This ruling was accepted as authoritative for many years, but it was shaken by observations made in a later case by Lord Westbury, who held that a house is purchased, not such as it is, but such as it is described to be. If, therefore, in the case supposed, A. had intended to reserve any right over the house conveyed to B., he should have reserved it

expressly in the conveyance, and as he did not do so, no such right could be included in the conveyance to C. The decision in *Pyer*, however, was subsequently supported by the high authority of Lords Justices Mellish and James, who declared it to be both good sense and good law, and added that most of the common law judges had disapproved of Lord Westbury's adverse *dicta*. Such was the unsatisfactory condition of the law when the first edition of Mr. Rankine's book was published. But in the present edition he adds: "The point is now set at rest; *Pyer v. Carter* has been repudiated, and Lord Westbury's view adopted in an authoritative and well-considered decision" (*Wheeldon v. Burrows*), in which Lord Justice Thesiger, giving the judgment of the Court of Appeal, based his opinion on the maxim that a grantor may not derogate from his grant. We quite concur in Mr. Rankine's preference for this latest phase of judicial opinion in England on the point in question; but, seeing that *Pyer v. Carter* has been expressly accepted as law in more than one Scottish case, particularly in the leading case of *Cochrane v. Ewart* in the House of Lords, we think it would have been better, as well as more consistent with the author's usual method, if, instead of representing the law as settled for both countries by the decision of the Court of Appeal, he had merely commended the decision as consonant to sound legal principle.

In the former edition of this work, upwards of three thousand cases were cited, Scottish, English, and American. In the present edition, considerably more than eight hundred cases have been added. Of this vast body of precedents a large proportion had never before been brought together in any publication more systematic than Shaw's Digest. Mr. Rankine has earned the gratitude of all practising lawyers by the clearness and fulness of his statement and analysis, by the orderliness and method of his arrangement and classification, and, not least, by the painstaking accuracy of his references. We have already sufficiently dwelt on the higher qualities which have enabled him, with singular independence of judgment, to review the decisions from the standpoint of fundamental principle, and to approve or impugn them according to their merits.

We have only to add in conclusion that we have found this volume much more readable than most law books, and that it is well fitted both to interest and to instruct any unprofessional person of ordinary intelligence, who is concerned in the possession or management of lands or houses in Scotland.

The Complete Annual Digest of every reported Case in all the Courts for the Year 1883. By ALFRED EMDEN and HERBERT THOMPSON, Barristers-at-Law. Clowes & Son (Limited). 1884.

MANY recent compilations have borne home to the lay mind a

truth which the legal understanding has been long painfully conscious of, that the practising lawyer's life cannot be a happy one. The cry for a code is the natural result, but there is room for doubt whether the remedy would meet the grievance. The grievance is the plethora of published cases, and the present laborious work is a striking illustration of its enormity. With all its limitations, this Digest contains more than 1200 cases adjudicated on during the year of grace 1883, and actually reported in one or other, or in many of the publications enumerated in its advertisement. A Scottish lawyer thinks himself passably fortunate, if, on his shelves, or on the shelves of a library to which he has access, there be contained, of English case law, the Weekly Notes and the Law Reports. Yet, here we find a notice not only of these, but of the Law Journal, the Law Times, the Weekly Reporter, the Solicitors' Journal, Cox's Criminal Cases,—all tolerably familiar names,—and of such special series as Cababé and Ellis, Aspinall, O'Malley and Hardcastle, Coltman, J.P., and Neville and Macnamara. It seems a stretch of greed to demand more. Yet a patriotic Scotsman, in full cry for a Secretary of State, sworn to ignore our "auld enemies of England," naturally turns over these pages with the view of discovering in how far the promise of the advertisement is fulfilled, that "all decisions of interest to the English lawyer, reported in the Court of Session and Justiciary Courts"—that is, in the pages of our own Rennie, to the exclusion of the Scottish Law Reporter—"are inserted in the Digest." The result is bitter disappointment. So far as we have been able to discover, not a single Scottish case is noted, which has not had the temerity to go to the House of Lords. It would be absurd to suppose that the year 1883 has been more barren than its predecessors in Scottish cases of imperial interest, or has been wholly devoid of questions relating to mercantile or international jurisprudence. We have not attempted to enumerate the Irish cases here rubricized. But of the American reporter—here, so far as promise is concerned, represented by Otto and the American Reports—may be said, as De Quincey says of his reporter, *Non est inventus*. So that, we fear, this compilation may be too truly described as an illustration of that English bumptiousness which began with the statute of Mertoun, and has blossomed out recently in the case of *Hope v. Ewing's Trustees*. Within its scope, as thus explained, the book is likely to be a most valuable compendium. There is no similarly complete *notandum* of the cases decided in all the English Courts. The periodical digest of the Law Reports is a purely domestic publication, with no bowels of mercy for anything beyond its own doors. Here every decision, "extravagant" or decretal, is welcomed. The practitioner is safe against surprise. And the student of law, who cannot afford the expense or the house-room required by the verbosity of modern law reporting, cannot do better than slip this thin volume

into his shelves alongside of Bell and Lamont, and the admirable continuation which redeemed our Scottish digests of the reproach of being the least peptic hunches of legal food which the world had ever seen since the days of Tribonian.

The History of the Orr-Ewing Case, with Verbatim Report of the Opinions of the First Division Judges: Notes on the Conflict between English and Scotch Jurisdiction, and the Remedy. By WALTER COOK SPENS, Advocate, Sheriff-Substitute, Glasgow. Edinburgh: William Green. 1884.

THIS little book appears at an opportune time, when public interest is keenly excited as to the conflict of jurisdiction in this case. Mr. Spens has written a clear and concise account of the proceedings, though we must confess it cannot fail to be a bit of somewhat difficult reading for the ordinary layman. The history of the case is brought down to the date of the interlocutor of the First Division on the reclaiming note against Lord Fraser's judgment. The last third of the book is taken up with some observations by the author on the state of matters, and suggestions for a remedy. He points out that whatever judgment the House of Lords may give, the result will be anomalous, because that tribunal must either decide that the Court of Session has power to prohibit the administration of an estate in England, which the House of Lords had previously ordered to be done, or it must determine that, although Scots (not Scotch, please, Mr. Spens) law and International law are both to the effect that the estate in Scotland must be administered in Scotland, still, in consequence of a Chancery decision, both Scots and International law must be overruled. The author then considers the cases in which English judges have assumed jurisdiction over Scotsmen in virtue of the *assumed* powers of the English Judicature Act of 1875; and he asserts what can hardly be denied by any unprejudiced person—1st, That it was impossible, except by express enactment, to confer any jurisdiction on the English judges as against domiciled Scotsmen which was not previously possessed by the English Courts; and 2nd, That such jurisdiction was not conferred by express enactment, and was not, previous to 1875, possessed at common law. These two propositions are discussed at considerable length, and the pages devoted to their treatment should be read attentively by every Scotsman, be he lawyer or not, who has the welfare and independence of his country at heart. Mr. Spens thinks that Scotland ought to insist on the repeal of the provisions at present in force with regard to the jurisdiction of English Courts over Scotsmen; and as regards the Orr-Ewing case itself he puts this question: "Is it desirable in the interests of the nation that the judgment of the First Division should be allowed to be decided on appeal by the

House of Lords?" The author suggests that the way to avoid the House of Lords being called on to give judgment would be to get an Act passed, "making it distinct that the administration of the estate of persons dying in the three kingdoms should be under the control of no other Courts than those of the domicile of the deceased; but that any estate situated in any of the three kingdoms, other than that of the domicile of the deceased, should be subject to the control of the Court of the country where situated, for payment of any debts due by the deceased to its inhabitants at the date of death." We are afraid that the proposed Act would have to be a little more distinct in its terms than the above sentence; and we have not the slightest hope that Parliament would be got to pass at short notice anything half so practical.

We have much pleasure in recommending this book to all who wish to inform themselves of the particulars of the important question treated in it. Here and there it bears marks of haste, but on the whole it is interesting and suggestive.

The Practice in Winding up Companies: A concise and practical Treatise upon the Law and Practice relating to the Winding up of Companies from the Commencement of the Winding up Proceedings to Dissolution, with Forms for use in Winding up, and Precedents of Bills of Costs. By ALFRED EMDEN, Esq., of the Inner Temple, Barrister-at-Law, Author of the "Law relating to Building Leases, Building Contracts, and Building," etc. London: William Clowes & Son (Limited), Fleet Street. 1883.

THIS winding up of public companies has become so common that a book such as Mr. Emden's cannot fail to be very useful, not merely to legal practitioners, but also to all those engaged in the management of companies. The various technical requirements of the "Companies Acts" are strict, and an apparently unimportant omission or failure to comply with some statutory rule may lead to important consequences, and affect the rights of parties interested. From the moment that liquidation is contemplated to the final dissolution of a company after its assets have been distributed, every step must be carefully considered. The first question to be settled in the case of a company to which the provisions of "Companies Acts" apply, is as to which of the three permitted modes of winding up is to be adopted. Although Mr. Emden has treated of voluntary liquidations in the second place only, they are more numerous than either of the other two classes, and we are inclined to think that it would have been better to have described the procedure in a voluntary winding up by itself, and not to have interposed the chapter dealing with it between the chapters

dealing with winding up by the Court and that on winding up under supervision. Though the latter is nominally a voluntary winding up, it is in reality merely a mode in which a company may be wound up by the Court, and which is adopted from reasons of convenience. A voluntary winding up, on the other hand, is broadly distinguished from either of the two others. The order, however, of treating the three modes of winding up is comparatively unimportant in a book of practice which will be referred to for guidance on the necessary procedure after the preliminary resolution has been carried. This first step has not perhaps received in this book the attention it deserves. It is not uncommon to find that a mistake has been made in framing either the notice calling the meeting or in the resolution adopted, and upon this point as on some others a reference to some of the cases decided in the Court of Session would have been valuable. In tracing the procedure in a winding up, Mr. Emden has been exposed to the temptation of incorporating discussions on the legal questions, *e.g.* the liability of shareholders and others, which are not strictly pertinent to his subject. To this he has not yielded, and the short references to the questions which may arise for consideration in a liquidation do not go beyond what is fairly permissible in a book on practice. Besides giving a clear account of the procedure under the Acts, Mr. Emden has printed a useful time-table showing the times prescribed by the rules of the English Courts relating to liquidation, a number of forms of petitions, etc., and carefully prepared precedents of bills of costs. The usefulness of a book of reference depends largely on the ease with which it can be consulted, and we note the care with which the index has been prepared.

The Month.

VACATION ARRANGEMENTS.—SPRING VACATION, 1884.

Bill-Chamber Roster.—The following is the rotation of Judges in the Bill-Chamber during the Spring Vacation:—

Friday, March 21, to Saturday, April 5—Lord M'LAREN.

Monday, April 7, " " 19 " KINNEAR.

" " 21, " May 3 " SHAND.

" May 5, " " 10 " RUTHERFURD CLARK.

Box-Days.—SPRING VACATION, 1884.

THURSDAY the 3rd day of April, and **THURSDAY** the 1st day of **May** next, are fixed to be the box-days in Vacation.

The LORD ORDINARY ON THE BILLS will sit in Court on WEDNESDAY, 9th April, and WEDNESDAY, 7th May, each day at eleven o'clock, for the disposal of motions and other business falling under the 93rd section of "The Court of Session Act, 1868;" and Rolls will be taken up on MONDAY, 7th April, and MONDAY, 5th May, between the hours of eleven and twelve o'clock.

SPRING CIRCUITS, 1884.

South.

The Lord MONCREIFF, Lord JUSTICE-CLERK, and Lord DEAS.

Ayr—Tuesday, 1st April, at twelve o'clock.

Dumfries—Wednesday, 2nd April, at twelve o'clock.

Jedburgh—Friday, 4th April, at twelve o'clock.

RICHARD VARY CAMPBELL, Esq., Advocate-Depute.

J. M. M'COSH, Clerk.

North.

Lords YOUNG and ADAM.

Inverness—Wednesday, 26th March, at half-past ten o'clock.

Aberdeen—Tuesday, 1st April.

Dundee—Thursday, 3rd April.

Perth—Friday, 4th April, at twelve o'clock.

A. TAYLOR INNES, Esq., Advocate-Depute.

HORACE SKEETE, Clerk.

West.

Lords MURE and CRAIGHILL.

Stirling—Friday, 21st March, at eleven o'clock.

Inveraray—Wednesday, 26th March, at eleven o'clock.

Glasgow—Monday, 21st April, at eleven o'clock.

ÆNEAS J. G. MACKAY, Esq., Advocate-Depute.

ÆNEAS MACBEAN, Clerk.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF ABERDEEN, KINCARDINE, AND BANFF.

Sheriffs GUTHRIE SMITH and SCOTT-MONCRIEFF.

LEIPPER v. LEIPPER.

Testament—Titles Act, 1868—Marriage as an implied revocation—Conditio si sine liberis.—A testator in 1866 made a settlement in favour of his illegitimate daughter, bequeathing "all his monies and property of whatever kind." He subsequently married her mother, and had by her other children, including a son whose birth he survived for several years.

He never revoked his settlement, and died possessed of heritable property. Held, that as the testator survived the passing of the Act of 1868, his settlement carried heritage, and that his marriage and the birth of other children did not operate as an implied revocation of this settlement.

The facts of the case are fully set forth in the following interlocutor:—

“*Keith*, 19th January 1884.—The Sheriff-Substitute having heard parties' procurators, and made avizandum with the closed record: Finds proof unnecessary: Finds that by deed of settlement, dated 1st June 1866, the deceased James Leipper, the father of the pursuer and defender, bequeathed to the pursuer, who was at that date his illegitimate daughter, all his monies and property of whatever kind, directing his executor to manage said monies and property for her behalf; that the said James Leipper survived the passing of the Titles to Land Consolidation Act, 1868; that between the date of his settlement and that of his death he acquired certain heritable properties; that he married the pursuer's mother and had by her several children, including the defender: Finds in terms of the said Act that the above bequest was effectual to convey to the pursuer all the property, both heritable and movable, belonging to the deceased at the time of his death; that his marriage subsequent to the date of his settlement did not act as a revocation of said bequest; and that it is not averred that the deceased ever revoked or altered said settlement: Therefore finds and declares, in terms of the prayer of the petition, in regard to the feu tenements and pieces of ground therein mentioned; and further finds, in regard to expenses, in terms of the mutual minute No. 5 of process, and decerns: Allows accounts of expenses to be lodged in terms of said minute, and, when lodged, remits them to the auditor of Court to tax according to scale II. and report, and decerns.

(Signed) “W. G. SCOTT-MONCRIEFF.

“*Note*.—One thing is abundantly clear in this case, and that is that there is no occasion for a proof, all the material facts being admitted. That the words made use of by the testator are sufficient to carry heritable property under the Act of 1868 is also clear. (See *Aim's Trustees v. Aim*, 15th December 1880, 8 Ret. 284.) As the testator survived the passing of that Act, its provisions apply. The only question which presents any difficulty is this: Whether the subsequent marriage of the testator did not operate as a revocation of his settlement? Now, had such a question arisen between a stranger and a child of the testator, I should have been disposed to answer it in the affirmative, in spite of the fact that the deceased James Leipper had ample opportunity for altering his settlement after the date of his marriage, had he desired to do so—a fact of considerable importance, as pointed out by Erskine, iii. 8. 46. But the pursuer is as much the legitimate child of the deceased as is her brother, the defender, who claims as heir-at-law. Marriage of itself does not, by our law, operate as a revocation of testamentary writings executed prior to it. There merely arises a presumption in favour of an implied revocation, which will depend for its strength upon the whole facts and circumstances of the case. Here these do not support the presumption, but, on the contrary, rather tend to overcome it. No doubt, at the time the settlement was made, there did not exist between the pursuer and testator the legal relationship of parent and child. As far as the law is concerned, the pursuer was a stranger. This is a point, and one of

Sheriff MAIR.

BANKRUPTCY CASE.—M.P., LECKIE, WATSON, AND CO. v. ROBERT HUNTER AND W. A. DUNN'S TRUSTEE.

Glasgow, 13th March 1884.—Cessio Acts of 1880 and 1881.—Held that a trustee under a disposition omnium bonorum was preferably to a creditor arresting subsequent to the disposition omnium bonorum.—This was an action of multiplepounding in which the fund *in medio*, £4, 6s. 8d., was claimed by Robert Tosh, accountant, Glasgow, trustee for behoof of the creditors of William Archibald Dunn, the common debtor, under a decree of *cessio bonorum* in his favour, dated 12th December 1883, and by Robert Hunter, portioner, Cumberland Street, Glasgow, a creditor of the common debtor, and who in virtue of a decree against him for £160, dated 11th and 18th September 1883, had used arrestments in the hands of Leckie, Watson, & Co., the holders of the fund *in medio*, on 14th and 28th December 1883. The question raised was, which of these parties was entitled to the fund *in medio*? Sheriff Mair, in delivering judgment, stated that it was maintained by the arresting creditor that he was entitled to the fund *in medio* on the ground that he had attached the fund, while no steps had been taken by the trustee in the *cessio*, either by arrestment or by intimation of the decree of *cessio* to the holder of the fund, and that a decree of *cessio* was no better than an assignation by the common debtor, which, without intimation, was incomplete and ineffectual as in competition with an arrestment. His Lordship, however, was of opinion that this argument was not well founded, and proceeded on a misconception of the character and effect of a decree of *cessio*. In the present case the decree of *cessio* was prior in date to the arrestment. The object of a *cessio* was to hand over the whole estate of an insolvent to a trustee for equal distribution among his creditors. Under the Cessio Act of 1836 the application was made by the insolvent himself; and before obtaining decree he required to satisfy the Court that his insolvency had arisen not from fraud, but from innocent losses and misfortunes. By section 16 of that Act the decree granting the benefit of *cessio bonorum* was declared to operate as an assignation of the debtor's movables in favour of any trustee mentioned in the decree for behoof of the creditors. The assignation was thus a judicial and statutory Act, and required no intimation, and the trustee was appointed to distribute the estate equally among all having claims upon it. The insolvent was thus divested of his estate just as much as he would under the operation of the Bankruptcy Act of 1856. After decree of *cessio* the creditors, at least those of them who have been called in the process, had no right to interfere with the estate, which had devolved upon the trustee for their general behoof. By being called in the action they had it in their power to object on cause shown to their debtor getting the benefit of *cessio*, but, once the decree was pronounced, the effect was to transfer the estate for equal distribution among them all. The trustee named in the decree did not represent the debtor. He held the estate for the creditors themselves in their just proportions. He was their debtor, but not for the general payment of the original debt, but only for the amount of the debt which might be afforded by the realization of the trust effects. In these circumstances, no diligence by an individual creditor could confer a preference, because such preference must neces-

sarily infringe on the equal rights of the other creditors indefeasibly vested in them by the operation of the decree of cessio. Accordingly Professor Bell, in his Commentaries, laid it down (7th edition, vol. ii. p. 485) that "no individual creditor can take separate proceedings to raise for himself a preference subsequently to the disposition *omnium bonorum*." The recent Cessio Acts of 1880, 1881, and 1882 did not in any way alter or affect the provisions of the Act of 1836 so far as the effect of the decree of cessio was concerned. If effect was given to the contention of the arresting creditor in the present case, the result would be to set at nought the beneficial provisions of the whole of the Cessio Acts, and to deprive the creditors of that which was intended—namely, an equal distribution of the estate among them. His Lordship, therefore, sustained the claim of Mr. Tosh, the trustee, to the fund *in medio*.

Wallace & Wilson for Mr. Hunter—John Stuart & Gillies for Mr. Tosh, trustee.

SHERIFF COURT OF LANARKSHIRE.

Sheriff LEES.

GILLON v. DIXON (LIMITED).

Reparation for son's death—Title of mother to sue.—Held that if a person be killed through another's fault, his mother has, on the death of her husband, without discharge or satisfaction of the claim for reparation, a right to make the claim in her own name. The circumstances of the case are detailed in the following note to the Sheriff-Substitute's judgment, which repelled a plea of no title to sue, and allowed a proof:—

"*Note.*—The pursuer is the mother of the deceased Thomas Gillon, who was killed in one of the defenders' pits on 30th November 1881. Her husband survived his son for about ten weeks, and before his death made a claim on the defenders for reparation, and was about to raise an action to enforce it. Mr. Miller now urges on their behalf that the right to prosecute the claim died with the husband, and that in any event the pursuer has no title to sue unless she be confirmed as executrix to her husband. The basis of the first contention is, that such a claim is a personal action, that it belonged to the husband, and that therefore the right to prosecute it died with him, according to the rule *actio personalis moritur cum persona*. But whatever be the nature of such a claim as this, it is, I apprehend, when made by a husband, made on behalf of his wife and himself; and whether he could discharge such a claim unsatisfied without her express assent does not need to be determined, for it was certainly not discharged here. The basis of the second contention is that the right to compensation for his son's death was a right which vested in the lad's father, and passed to his heirs *in mobilibus*. I doubt if this argument is sound. If it were, then the trustee of a bankrupt father, or the children of a solvent father who had died, could prosecute a claim for a son's death. But the latter alternative has on two occasions been negatived in the Supreme Court, and the former seems obviously bad. The right to make such a claim belongs only to a person between whom and the deceased there existed *ex jure naturali* a mutual obligation of support; and where such existed, our law, differing from that of

England, allows *solatium* also to be awarded. Now, a trustee is possessed of no such right, and is under no such natural obligation. I think, therefore, that the right to make this claim for his son's death was not *in bonis* of the pursuer's husband; and it may be questioned whether his interest in it was capable of assignation by him during his lifetime, or of surviving him after his death. It seems to me that the solution of the difficulty is to be found in the view that the mother of Thomas Gillon had a potential right to claim reparation which, unless satisfied by payment to herself or her husband for her, or expressly or impliedly discharged, emerged on her husband's death, and can now be insisted in by her."

A proof accordingly took place, and the defenders were assoilzied on the merits. The pursuer appealed to the Court of Session, but the First Division adhered.

Act. Orr—Alt. Miller.

Notes of English, American, and Colonial Cases.

NEGLIGENCE.—Railway Company—Accident—Level crossing.—The defendants' line of railway crossed a public footway and carriage-way on the level. There were carriage gates at the crossing which were locked, a gatekeeper being stationed there by the defendants whose duty it was to open and shut them when required; the wicket gates used by foot passengers were not fastened. There were trees and houses on one side of the crossing so situated as to make it impossible for any one crossing from the down side to see a train coming until he got within a foot or two of the down metals, but when once the down rails were reached there was an uninterrupted view up and down the line for the distance of about 300 yards. The plaintiff passed through the wicket gate for the purpose of crossing from the down line side to the up line side of the crossing, and walked over the down line to the centre of the crossing, and thence to the up line, when he was knocked down and injured by a train travelling on the up line. The plaintiff admitted that if he had looked along the up line before actually crossing the up metals he must have seen the approaching train. The engine-driver of the train did not whistle, nor did the gatekeeper take any steps to warn the plaintiff of the danger of crossing, or to prevent him from doing so:—*Held* (by LORD COLERIDGE, C.J., and DENMAN, J.; *dubitante* MANISTY, J.), upon the above facts, that the accident was solely due to the plaintiff's own recklessness, and that there was no reasonable evidence of negligence on the part of the defendants to be submitted to a jury. *Davey v. The London and South-Western Rail. Co.*, 52 L. J. Rep. Q. B. D. 665.

PUBLIC HEALTH ACT, 1875 (38 and 39 Vict. c. 55), s. 264.—*Notice of action—Action for recovery of land.*—Where an action was brought against a sanitary authority, to recover possession of some land of the plaintiff, which had been taken by the authority in the course of their operations, but without any consent given, or agreement as to purchase having been made,—*Held*, that they were not entitled to notice of action under section 264 of the Public Health Act, 1875. *Holder v. The Mayor, etc., of Margate*, 52 L. J. Rep. Q. B. D. 711.

THE JOURNAL OF JURISPRUDENCE.

THE SPHERE AND FUNCTIONS OF AN ACADEMICAL FACULTY OF LAW.

"1ST GENT.—

An ancient land, in ancient oracles,
Is called "law-thirsty": all the struggle there
Was after order and a perfect rule:
Pray where lie such lands now?

2ND GENT.—

Why,—where they lay of old,—
In human souls."

—*Old Play.*

THE age in which we live is emphatically a period of transition. In whatever direction we look, the conviction is forced upon us that "the old order changeth, yielding place to new." Institutions, which to our forefathers seemed to rest on foundations as stable as those of the everlasting hills, are everywhere being abandoned to slow decay, or threatened with sudden destruction. Nor in the world of thought, where lie the hidden sources from which our actions flow, is the spirit of change less clearly seen. Propositions, for ages accepted as self-evident, and standing no more in need of proof than mathematical axioms, are now lightly pronounced to be the mere figments of a disordered imagination. In fact, nothing is nowadays taken for granted, and we are earnestly warned by those whom we count our prophets against yielding to that ineradicable tendency of human nature, that veritable *idolum tribus*, which inclines us to find a mystery in human life, and, worst of all, to believe "where we cannot prove."

So far are we from saying that "whatever is, is right," that we really throw the *onus probandi* on the champions of existing institutions, declaring the presumption to be in favour of our contention that "whatever is, is *wrong*," and,—what is far more serious,—that we were "born to set it right." At the same time,

there are not wanting more profound thinkers who tell us that society is too organic to be amended by our fire-new remedies, that we must study its growth and development before we can hope to understand its diseases, far less to cure them, and, at the best, must be content with very slow and gradual improvement, instead of expecting our evils to disappear in the twinkling of an eye, at the "Heigh Presto" of some ministerial magician. The doctors of the old school who drenched and cupped our grandfathers with such blind confidence in the efficacy of their drastic remedies to overcome the disease, and with such a fine contempt for the patient who was weak enough to die of the physician, have long passed away, making room for a milder generation of scientific practitioners, who rely less on their power of expelling diseases *vi et armis* from the human citadel, and more on the hope that nature, under favourable conditions, will work out her own cure. Many will agree with Mr. Herbert Spencer in thinking that our would-be healers of the "body politic" might well learn the same lesson. We must not be too sanguine about curing old evils by Acts of Parliament; there is much truth in Seneca's epigram:—

"Quod ratio nequit, sæpe sanavit mora."

But the growing disbelief in the value of political nostrums ought not to chill our aspirations after a better state of things. "Prevention is better than cure," and we have still much to hope from a deeper knowledge of the conditions of social well-being. Perhaps the most encouraging sign of a wide-spread sense of the sacred duties we owe to posterity is to be found in the increasing interest which is felt in all quarters with regard to questions of education.

It is only within our own time that education has come to be regarded, not as the privilege of the rich, but as the right of all. Immense as are the difficulties which beset a national system of education, hampered, as it must needs be, by the formalism and rigidity inseparable from an organization of so great complexity, the establishment of the principle that it is the duty of the State to see that no citizen grow up in ignorance of the elements of learning, marks an epoch in our history, amusing though it be to hear the *laudatores temporis præsentis*, if we may be allowed the phrase, triumphantly proclaiming, as the ripest fruit of modern thought, a doctrine preached by Aristotle more than two thousand years ago (*Pol.* viii. 1, 133).

But, although elementary education has so largely occupied the attention of the public during the past few years, the claims of the higher culture have not been entirely disregarded. Influential Commissions have investigated the condition of the ancient Universities, both in England and Scotland, and in the former country extensive changes have been effected in the administra-

tion of the large revenues of the colleges at Oxford and Cambridge, by which a considerable number of new chairs have been sufficiently endowed. The commissioners have very wisely left more direct reforms in the system of teaching and examining to be effected by the governing bodies themselves. We say "very wisely," for if drastic measures are in general to be avoided in our attempts at social and political reform, we can conceive no case to which this rule is more applicable than when it is proposed to reorganize an historical seat of learning. With more than ordinary reverence ought we to regard those venerable institutions, which, with all their faults (and they have not been few), have yet kept alive in our midst the sacred fire of learning through many a "cloudy and dark day."

Here, if anywhere, it behoves us to act in no spirit of iconoclasm, but with anxious and earnest thought, not shutting our eyes to abuses, but ever fearful lest when we gather up the tares, we root up also the wheat with them. The activity and importance of the Universities, so far from being diminished by the improved character of our primary and secondary schools, is likely, we think, to be thereby greatly increased, and that from several considerations. In the first place, we may expect that in the future a very much larger number of the most promising boys from the lower classes will, by the aid of scholarships, bursaries, and the like, be enabled ultimately to enter the Universities. In the second place, the necessity of competing with students selected from a much wider social area, will greatly stimulate the energies of the higher-class schools. Already in England possibilities of higher instruction, long denied to any but the comparatively rich, have now been brought within the reach of a large section of the community, by the establishment of colleges in our great commercial centres, such as Manchester, Birmingham, and Leeds; while the more popular nature of the old Scottish Universities will enable them to receive an increased number of students from all classes, without any great change in the present system.

It becomes, then, a matter of the last importance to consider what place our Universities ought to occupy in the framework of society, and how they may best be adapted to supply the wants of the age. To indicate, however imperfectly, the scope of a Faculty of Law, which shall be able to afford a high scientific training, is the purpose of the present essay.

It is obvious, at the outset, that, however wide may be the sphere which we see fit to assign to such a Faculty, it can be by no means co-extensive with the sphere of law itself, if we take that word in its largest signification. "It is the custom in science," says Mr. Mill, "wherever regularity of any kind can be traced, to call the general proposition which expresses the nature of that regularity, a law."

It is, however, the special function of physical science, not of jurisprudence, to discover such uniformities of sequence in the external world, and to express them in as few general propositions as possible, by continually subsuming laws of narrower under laws of wider generality. But the metaphysician will tell us that our knowledge of such uniformities can only be in virtue of the possession of law-giving minds, that it is, in fact, only because we are rational beings that we find the world in some degree a *κόσμος*, not a chaos. Whereupon the divine will cry that both laws of matter and laws of mind are in reality laws of God, and that, in the ultimate analysis, *lex deus ipse*. As we have no wish to include physical science, metaphysics, and theology under our Faculty, it is clear that it cannot therefore concern itself with all laws.

On the other hand, it will not do for us to accept the definition of the, so-called, English School of Jurisprudence, and hold, with Bentham and Austin, that the laws we have to deal with are mere arbitrary enactments; so that an order to commit murder, if issued by a superior to an inferior, and accompanied by a sanction, is as much entitled to the name of "law," as the divine commandment which says such an order must be disobeyed. For we hold that it is within the province of the jurist, as well as of the mathematician or chemist, to discover laws of nature which, though we may disregard them, change not, but spring eternally from the same ultimate source.

If it be not so, to talk of a science of Jurisprudence is a mere abuse of language, and our Faculty of Law will have to hang for ever, like Mahomet's coffin, suspended in air. But if we thus earnestly maintain that we too are concerned with laws of nature, and if no talk of commands and enactments will induce us to attempt to build a house without foundations, or hope that a tree will grow when we have cut away the roots, how are we to define the sphere of our science, or of the faculty which has to deal with it? Happily, *res non est integra*.

In an inaugural lecture on this subject, delivered to the Law Faculty of the University of Edinburgh in 1863, Professor Lorimer arrived at a definition by a method which irresistibly reminds us of Plato's search for justice in his ideal state. Plato, as all readers of the "divine" Republic will remember, says that if the state has been perfectly organized, it must be wise, brave, temperate, and just. Now, regarding the virtue of the state as a given quantity, if we can discover the amount of wisdom, courage, and temperance, the remainder of virtue, not so accounted for, must be justice, since, *ex hypothesi*, these four qualities exhaust the whole goodness of the community. In like manner, Professor Lorimer, assuming that all branches of knowledge must ideally be included in one or other of the four faculties, into which universities have from time immemorial been divided, says if we

are able to assign to the Faculties of Divinity, Arts, and Medicine, what respectively belongs to each, the remainder will rightly fall within the sphere of the Faculty of Law. Plato, of course, is treating us, *more suo*, to a little graceful badinage. We cannot really calculate the quantity of virtue in a state, even an ideal state, by such an easy arithmetical process; and an act that is brave, may likely enough be just and temperate as well. Had not the philosopher started on his quest with a shrewd notion where to find his definition, his method would have stood him in small service. But the Professor's argument, though similar in form, escapes the fallacy. Unless we are to increase the number of our faculties, it is clear that every new subject which the University admits must be assigned to one of the existing four.

Our object, then, will be to find what distribution will best preserve the distinctive character of each of the ancient faculties. Professor Lorimer, agreeing with Pope that "the proper study of mankind is man," makes the relation which man holds to the subject of study the *fundamentum divisionis*.

"The non-professional classes," he says, "which we (*i.e.* the Faculty of Law at Edinburgh) possess, and still more those which are attached to the Faculty of Law in universities in which that faculty is more fully developed, taken along with the character of the profession of the law, tell us unmistakably that this academical faculty, in its ultimate sphere, must embrace the whole science of man seen in relation to his fellow-men and to the external world. As the highest manifestation of mere animal life, he falls to the share of the Faculty of Medicine; as an isolated spiritual existence, he forms the noblest study of the Faculty of Arts; in his relation to the Creator, it is the sublime function of the Faculty of Divinity to deal with him; but *as a social being* he is ours and ours alone." The relations, then, which properly fall within the sphere of a faculty of law, will be those which exist between the community and the individual, between individuals themselves, and between communities themselves. This corresponds necessarily with the division of positive law into public, private, and international law; but a law faculty is concerned not only with the legislative enactments by which these relations have in many cases been determined, but also with the nature and history of the relations themselves.

This is clearly assigning to our Faculty a much wider extension than would be required, if we were to regard it as merely intended to afford the necessary amount of professional knowledge to legal practitioners, though even viewed in this latter aspect our existing law faculties are very far from complete. Probably the best example in this country is afforded by the University of Edinburgh, and yet against her six professors of law, all told, Berlin can show seventeen, besides *privat-docenten*.

But there are many reasons which induce us to think that an

academical faculty of law ought not to limit itself to the direct requirements of the profession for which most of its students are preparing.

To begin with, a university cannot turn out a lawyer.

A faculty of medicine can indeed constantly supplement its theory by practice, by enabling its students to apply in the hospital or the dissecting room the knowledge they have acquired from their lectures and text-books, and so send out its graduates fully equipped into the professional arena. But this is far from being the case with a faculty of law. The technicalities and minutiae of municipal systems can only be mastered by patient conning of the standard institutional writers, and no theory can supply the place of the knowledge of forms of procedure, and acquaintance with business methods, which must be obtained in the chambers of the solicitor, or by "haunting the Courts," as the old statute quaintly phrases it.

Moreover, by keeping within the strictly professional lines, we practically exclude a considerable number of students, not unlikely to avail themselves of the training which might be afforded by a faculty of law conceived in a more liberal spirit. We refer especially to the sons of the landed gentry and others, who have no intention of practising any profession, but hope to discharge with dignity the duties of the country magistracy, and look forward to the probability of becoming at some time members of the Legislature. Not a few such men take the Honour School of Jurisprudence or the Law Tripos at the English Universities, or, at least, include some branch of legal study among their subjects for an ordinary degree in arts, but this would soon cease to be the case if all law students were compelled to attend lectures in subjects without interest or importance to any but the practical lawyer. We are persuaded that if a degree in law were to be obtained which should be a genuine mark of academical distinction, without necessitating the acquirement of mere professional detail, it would present great attractions to those who intend to enter political life, and might at no distant day be regarded as indispensable to the attainment of the higher offices of the state.

It is, indeed, matter of surprise that no guarantee of scientific education has ever been required in this country from the holders of political offices. In Germany, all candidates for the higher civil appointments must possess the degree of Doctor of Law, or otherwise prove that they have received regular instruction, and have passed examinations not only in municipal jurisprudence, but also in natural law, politics, and political economy.

Members of Parliament are not nowadays open to the charge of being insensible to the responsibilities incident to their position, and if popular feeling were in favour of candidates who were known to have spent several years in the systematic study of politics and scientific jurisprudence, there would probably be no

need for express enactments, which might bear hardly in particular cases. We can no more make a great statesman than a great poet, but the fact that *poeta nascitur non fit* does not relieve him of the necessity of learning the rules of grammar, like other less favoured mortals. It is not at first sight evident why we should consider an ordinary country gentleman or city manufacturer, with nothing to guide him but the light of nature, usually not a little obscured by the passion and bigotry of partisanship, as competent to make the law, which only a man of long experience, and tried ability in legal pursuits, is allowed to administer.

And if politics be in any degree a science of which the laws can be discovered and expressed in general propositions, under which particular cases can be brought, the sooner this is recognised the better; for of this we may be certain, that the politician will no more learn the principles of his science in the heated arena of St. Stephen's, than the barrister will learn jurisprudence in the law courts, or the doctor physiology in his consulting-room.

Theory and practice find their fullest realization in conjunction,—it is on the facts of life that a science must be based, and by comparison with them that its conclusions must be tested,—and the sound politician will be he who can apply a mind familiar with scientific methods to the complex phenomena of modern society, and evolve from them such general principles as his empirical knowledge of the art of legislation will enable him to put into execution. Many must, no doubt, always be content to accept their principles at second-hand, but the man who attempts to dispense with theory altogether well deserves to be called, as Hesiod called him long ago, a “cumberer of the ground:”

οὗτος μὲν πανάριστος, ὃς αὐτῷ πάντα νοήσῃ,
 ἐσθλὸς δ' αὖ κακῆϊνος, ὃς εὖ εἰπόντι πίθηται.
 ὃς δὲ κε μήτ' αὐτὸς νόεῃ μήτ' ἄλλου ἀκούων
 ἐν θυμῷ βάλλεται, ὃ δ' αὖτ' ἀχρήσιος ἀνὴρ.

—*Works and Days*, ll. 291–298.

It has been very well said, that “if sound theory be separated from sound practice, they both die, one becomes a ghost and the other a corpse.” Nothing is so distinctive of the truly scientific man, in whatever department, as the faculty which he possesses of seeing in every particular case an exemplification of some general rule, and, conversely, of rapidly deducing from a general proposition the particular consequences which it involves; and it is precisely this faculty which it is the especial function of scientific education to develop. The facility with which these operations are safely performed by men whose minds, originally strong, have been thoroughly trained to avoid the fallacies into which the *intellectus sibi permissus* is apt to fall, becomes almost instinctive. They appear to arrive at their results less by conscious processes of induction and deduction, than by being able to clothe the particular

in the universal, and to break up the universal into the particulars which compose it, by a single effort of thought. Without this trained faculty, the politician must continually be betrayed into hasty generalizations or unsound inferences, of a kind only too familiar on the hustings and in the Senate. But it is not only for politicians that we believe a faculty of law, in this extended sense, would supply a training hardly now obtainable, but also for the higher class of civil servants and candidates for the diplomatic offices of lower rank. The examination now required for the post of attaché is almost ludicrously narrow when compared with the corresponding tests exacted by our neighbours on the Continent; and yet we are not, as a nation, in the habit of priding ourselves on the possession of *more* than the average share of that fine tact and discrimination, which in a Government agent abroad will sometimes cover a multitude of sins; while foreigners give us credit for considerably less. Surely something more than a knowledge of French and German, geography and modern political history, with some expertness in the art of précis-writing, even when coupled with the "general intelligence," which the examiners hope to make sure of, and the absence of which it is the office of the experienced "crammer" to enable his pupil to conceal, might fairly be expected from men who are destined in some degree to represent their countrymen in foreign courts. If the authorities could see their way to giving due weight to a legal degree, it can hardly be doubted that the State would secure more efficient servants.

But, even admitting that no great change is likely to be effected in the *personnel* of our law students, and that, with few exceptions, they may be assumed to be qualifying themselves for the practice of the legal profession, we believe that the proposal to extend the sphere of a faculty of law over the whole field of social relations would be fully entitled to the support of all who have at heart the highest interests of the profession.

It has always been the glory of the Bar, both in England and Scotland, that its members were, for the most part, not merely acute practitioners, but cultivated and accomplished gentlemen, and to this fact the social prestige which they have enjoyed has been chiefly owing.

Although the possession of a degree in arts is not indispensable for a "call," barristers, with comparatively few exceptions, have for a long period been graduates of one or other of our Universities, notwithstanding the fact that a knowledge of Sophocles or the calculus can hardly be said to be demanded by the exigencies of forensic practice; and there is every reason to hope that a degree in law, if recognised as a real mark of distinction in the province with which it deals, would in course of time come to be regarded as equally necessary.

With regard to the other branch of the profession, there is,

unfortunately, no such antecedent probability. The literary qualification required for admission as a solicitor has, neither in this country nor across the border, ever exceeded the passing of an examination, such as would offer little difficulty to a fairly intelligent boy of fifteen, on leaving a school of average reputation, and far easier than is required by many universities as evidence of a student's capacity of profitably commencing his academical career. That a much higher standard of culture is ordinarily attained by solicitors, especially by those who have a town practice, it would be of course impossible to deny, but some guarantee of the fact of its attainment might not unreasonably be demanded from the members of a learned profession. The possibility of an uneducated or half-educated man being admitted ought, we think, to be practically excluded, and the dignity of the profession would be materially enhanced if an examination of a standard not lower than that required for the degree of B.L. in the University of Edinburgh, were absolutely compulsory.

Attendance on classes in all the subjects covered by the examination need not be exacted from students, many of whom reside at a great distance from a university, but, where practicable, that would no doubt be the fittest preparation, and, in most instances, voluntarily adopted. A sufficient inducement to take a degree in law would in time be created by the increased status enjoyed by its holders. The gravest obstacle to any such scheme lies in the present system of long apprenticeships, a survival of a time when similar terms were generally required, in other occupations, of any one who was to be a master of his craft. Long unnecessary, and now, we believe, almost unknown, in the sister profession of medicine, it still continues to be the only avenue to the practice of a solicitor, though apprentices would be the last to deny that the way to professional success would seem easier, if more attention were paid to their reading and less to their writing.

When books were scarce, and a journey from Inverness to Edinburgh was an undertaking of no small anxiety, the master was really the fit guide and teacher of his apprentice in legal studies, and the relationship was not a purely business connection, as is now generally the case. But at the present day, a boy who enters a solicitor's office at fifteen must be endowed with more than the ordinary share of the divine thirst for knowledge, if he is to find time in his scanty leisure for more than the acquirement of the necessary amount of Scots law and conveyancing. The noble enthusiasm and heroic self-denial with which many men *do* educate themselves under such disadvantages, ought not to blind us to the defects of a system which renders it necessary to sacrifice some of life's keenest pleasures, and to "provoke the years to bring the inevitable yoke."

If the term of apprenticeship were reduced to three years, and every possible encouragement were held out to induce men to

enter the Universities, it can hardly be doubted that we should have a large accession to the number of our law students, and it is difficult to see how the profession could suffer any loss. Reverting, then, to our definition of the sphere of a law faculty as co-extensive with that of the whole human relations, and concerned with laws deducible from human nature, let us consider what branches of study will fall to be included in it. These may, we think, be divided into three main groups:—

I. Political Philosophy, embracing Politics, Sociology, Ethnology, and Political Economy.

II. History.

III. Jurisprudence.

Were adequate provision made by our Universities for the teaching of the subjects placed under the first head, we believe no anxiety need be felt as to a sufficient number of students being found to avail themselves of it. In themselves of commanding interest, these studies, if rightly directed, are capable of affording a highly scientific training. To many men of keen intelligence, the problems of mathematics or philosophy present but little attraction from the abstract character which essentially belongs to them. They appear to such persons too far removed from daily life, too little in touch with the workaday world, to possess any utility except as instruments for the cultivation of human reason. The number of people who regard the mathematician or the philosopher as otherwise than a mere dreamer, whose labours do nothing to lighten the common load of humanity, is after all very inconsiderable. Kant would have held but a low place in the estimation of his neighbours,—would have been talked of in a pitying kind of way as a quiet, harmless man, but hopelessly “unpractical,”—if his lot had been cast in an English manufacturing town. The man of business has, for the most part, no conception of the dignity and sweetness which fill the quiet life of the scholar, the *θεωρητικὸς βίος* which Aristotle tells us is most truly divine.

But of the value and importance of full consideration being given to questions of politics,—of discovering how the constitution may best be adapted to the circumstances of the age, whether free trade or protection is likely in the long run to be more profitable to the country, how we may hope to grapple with the vast social problems which cry out for solution, what can be done to alleviate the misery of our great cities,—that these and a thousand like subjects ought to be scientifically considered, all classes of the community are agreed. The man who dismisses, as beneath contempt, speculations on the origin of ideas, feeling, quite justly, that they will stand him in no service in the race for wealth, is the very man who can see that the opinion taken by the country on the subject of free trade will directly affect the price of the quartern loaf. But it will be objected that, though the

practical importance of such questions being rightly decided, is freely admitted, no theorizing about them will really help us. Each case has to be settled as it arises, and judged of on its merits, according to the dictates of sound reason and common sense. No general rules can be framed, and consequently there neither is nor can be any science of politics. In a certain sense, no doubt, this is perfectly true. The phenomena of society are highly complex, the number of causes in operation and of effects produced is very great; worst of all, the causes and effects are so intermingled, and act and react upon one another to such an extent that often the greatest difficulty is to find out which are antecedents and which consequents. Hence it arises that very few general propositions applicable to the whole political world can be enunciated except such as are of little or no value. Nor, seeing the impossibility of predicting from our knowledge of an individual what will be his conduct in a particular case, is it to be expected that we should be able to form predictions concerning the future conduct of groups of individuals, all of whom are personally unknown to us. But, as Aristotle remarks, it is characteristic of the educated man to expect no higher degree of accuracy than the nature of the subjects admits of:—*πεπαιδευμένου γάρ ἐστιν ἐπὶ τοσούτον τὰ χριβεῖς ἐπιζητεῖν καθ' ἕκαστον γένος, ἢ φ' ὅσον ἡ τοῦ πράγματος φύσις ἐπιδέχεται.* (*Eth. Nic. I. 3.*)

(*To be continued.*)

THE HERITABLE MACERSHIP.

If any one desires for a few minutes to enjoy some of those curious anomalies everywhere to be found among the national institutions of this island, let him take up the Finance Accounts of the United Kingdom, and, turning to the head of Annuities and Pensions, study the various entries relating to those of them which are hereditary and perpetual. He will gather food for reflection and much that is interesting and instructive there, but amongst all these hereditary pensioners of the State he will not find included that remarkable personage the Heritable Macer of the Court of Session, the history of whose origin and development we propose now to attempt to trace.

The first mention of this curious old office is to be found in a grant by King James III. as far back as 1483, "*Officii Clavigeri et Serjeandi armorum,*" along with the lands of Myres in Fife, to John Scrymgeour and his heirs male. There does not appear to have been any mention of assignees. In 1530 there was a renewal of this grant. The next step in the history will be found by reference to the Acts of the Parliaments of Scotland, where there is in 1641 a "*Ratificatione to Collonell Johnne Lesly*" of "ane

charter and infeftment," granted in his favour on 22nd February 1634, as "Laufull sone to vmq^{le} David Leslie of Otterstoune and Agnes Logane his spouse." The Act refers to the lands of Myres and Auchtermuchty in the "Stewartry and Sheriffdom of Fife," and further ratifies, approves, and perpetually confirms a signature of the king, dated 20th October 1641, giving "to the said Collonell John Leslie in lyferent and to Patrike Leslie his sone his aires maill & assigneyes whatsomevir heritable in fie the office of meassarie and serjandie of armes togidder with ye haill Dignities Priviledges and Dewties perteaneing and belonging therto togidder also with ye fewferme Dueties of the Landis of Myres Over and Nether." It is evident that between 1530 and 1634 the rights of this office had passed out of the family of Scrymgeour into that of Leslie. The terms of the Act we have quoted are remarkable and interesting, nor can it be doubted that the office in its original form was one of dignity and importance, probably also being purely honorary in its nature. It is not unlikely that, when first created, the Sergeant of Arms may have held a post of trust about the Court, or even the person of the Sovereign, and consequently that after the accession of James VI. to the English throne it would gradually sink more and more into insignificance. We hear no more directly of the office or of its holders for the next fifty years, though it appears that the lands and barony of Myres had changed hands more than once in the interval, for in 1670 they were disposed by John Bayne of Pitcairly, with consent of Lord Lindoirs, to one George Moncreiff, along with other lands in the immediate neighbourhood. There does not appear to have been any express disposition of the patronage of the office conferred upon the Leslies with the "ten pounds ten shillings" of salary, or, at least, there must have been felt to be some ambiguity in the grant, for a new and extended gift was made to Moncreiff of Reidy in a charter of *novodamus* he procured for himself and his heirs on 5th December 1690. Proceeding upon this new right, Moncreiff claimed to exercise his patronage, but was not permitted to do so without dispute, for the point was brought before the Court of Session, and is reported in Fountainhall's Decisions, 8th November 1692, and again, 11th January and 2nd February 1693.

Moncreiff had been infeft, and upon the first of these dates presented a Bill craving that one Francis Naesmith might be admitted macer in place of Thomas Melvill, deceased. This, says Lord Fountainhall, was encountered by two other Bills, one from William Innes founding on a prior agreement and gift from the patron; the other from Sir William Lockhart, Solicitor-General, on behalf of the Crown. It seems that Moncreiff had obtained an order to record in the Books of Sederunt his new gift and charter, to which we shall hereafter more particularly refer; but the Court refused to entertain his contention that this amounted to a confirmation by them of the deed, and they held that "the cause was

yet intire, unjudged; and that they could declare no man's right good without hearing parties; and that it was only for publication and preservation inserted in their books *periculo petentis et salvo jure cujuslibet*." Subsequently, when upon 11th January 1693 the question again came before the Court for decision, more light is thrown upon the position occupied by Moncreiff in relation to the office. There seems to have been at the outset a dispute whether the original charter to Leslie, and the new one to Moncreiff, did not imply a double gift, and consequently whether the claimants to the office were not both entitled to it,—one through the king, and the other through Moncreiff. King William's charter of *novodamus* bore simply to confer the *jus presentandi et nominandi* of a macer before the Lords of Session; whereas the other charter of 1641 referred merely to the *officium clavigeri et serjandi armorum*; and accordingly, in the words of the reporter, "The plurality carried that the new charter was disconform to the old infeftments." Finally, the Court held that under his new charter there was sufficient to give Reidy (Moncreiff) a title right and interest to present a macer. It is remarkable that the report dwells upon a counter argument, which seems to have been strongly pressed, and to have carried weight with it, namely, that "though princes, *ex plenitudine potestatis*, may give away offices heritably, yet it is a dilapidation and misadministration, and wrongs the Crown; and in process of time not only the four macers, but many other greater offices, may be dismembered from the royal prerogative by sustaining of this." The last reference to this dispute bears date February 2, 1693, and turned, it seems, upon the right of the King's Advocate to "insist for the king's interest." The Lords held that the private party's right being now settled, the King's Advocate could only appear by special warrant from his Majesty, "there being only two cases wherein he could quarrel the subject's right, either by giving his concurrence to actions of one subject against another, or when he had a mandate from the king to that effect; otherwise he might vex all the lieges with processes, and open their charter-chests." The Court declined to supersede the matter, pending an appeal to the king, or the issue of a special warrant to the King's Advocate. While that officer could not appear without a warrant, the Court nevertheless could consider defences *in jure*, and their relevancy. Another point raised unsuccessfully against Moncreiff's plea was that he had received a right to present to a non-vacant office. It was held that the maxim *beneficium non vacans nequit conferri* applied. Again, if it were lawful for the king to give to the Justiciary Court the patronage of all the macerships, as undoubtedly he could do, there was power to confer the same right on one man, and consequently the case did not fall under the Act of 1587 against giving away the king's privileges or casualties in bulk. What is quaintly described as "the tenderest point of all" in the decision, had reference to the effect of an Act of 1455

whereof were now expressly made to include Scotland and Ireland, while at the same time they were extended and strengthened. Under the third section of this Act it was declared to be a misdemeanour for any person to "sell or bargain for the sale of, or receive, have, or take any money, fee, gratuity, loan of money, reward or profit, directly or indirectly, or any promise, agreement, covenant, contract, bond, or assurance," or to contract or agree by any way, device, or means for such sale of any office, commission, place, or employment specified therein, or in the Act of Edward the Sixth. An exception was, however, expressly made by the eleventh section in favour of any annual reservation, charge, or payment, out of the fees, perquisites, and profits of any office to any one who might have previously held the same, where the amount should be duly set forth in the commission, patent, warrant, or instrument of appointment of the person succeeding to the office, and paying or securing the money. It may be very seriously doubted whether the provisions of this enactment could affect the heritable right of patronage in the macership, created as it was by Crown Charter, with the subsequent sanction of an Act of the Scottish Parliament; but we may remark as somewhat significant, that, this Act having become law in June, it is recorded that, on 7th December 1809, "The Lords having observed that it was stated in a petition by John Graham, one of the ordinary macers, that he holds his office under a commission by Mr. Moncreiff of Reidy, proceeding upon the narrative of a right he was stated to have of nominating one of the macers in this Court, and that he had been in the use of receiving from the petitioner a large proportion of the salary of the office: The Lords, considering this a matter of importance, remit to Lord Hermand and Lord Robertson to inquire into it and report." It may be that this zeal for the reform of abuses was born of the newly passed Act of Parliament; but however that may be, the two Judges made their inquiries, and presented a report upon 7th February 1810. In that report, after a brief reference to the origin of the right, they observed that the grant was said to have been taken into the investiture of the family of Moncreiff. Further, that the practice had been when a vacancy in the office took place, to receive from the presentee either a lump sum or an annuity. In the case of Graham this had been £45 a-year. In other words, the office of macer practically was in the hands of the highest bidder, a state of matters so objectionable that even in those days it came in for some share of reprobation. "What effect," say the Judges, "should be given to the alleged usage, but what may perhaps seem to be an illegal and unwarranted usage, the Court will determine. If it shall have the effect of establishing a right, it may be considered whether that right should not be redeemed at a sum equal to its value. But if there is no right in Mr. Moncreiff to withdraw any part of the salary, there is nothing to redeem." The

Court, we learn, approved of this report, but resolved for the present to delay consideration of the matter, with the result that they never subsequently took it up. In 1821 another Act was passed for the regulation of the proceedings in the Court of Session and Teind Court, and respecting the duties, qualifications, and emoluments of certain officers in these Courts. Amongst the offices so regulated were those of the macers, "including the one by hereditary right or his deputy," and a fixed salary was assigned to these officials in lieu of former arrangements. The reference to the hereditary office in this Act seems to imply a recognition of its peculiar character, and to some degree an admission of the practice of employing a "deputy," as he is called. It will be seen hereafter that in point of fact there was not any deputation about the appointment, the patronage being that of one of the "four ordinary" macerships, of whom the "Macer and Sergeant of Arms" was not one, so that the reference to a deputy in this Act clearly proceeded upon a misapprehension both of the true position of the possessor of Myres and of the tenure of his nominee in the ordinary macership.

The history of the two offices, for such we think they will now be acknowledged to be, was about to enter upon an entirely new phase. On 5th July 1828 a Crown Charter was issued in favour of Mrs. Margaret Stuart Tyndall Bruce and her husband, Onesiphorus Tyndall Bruce, for various lands therein specified: "Moreover, the office of macer and sergeant at arms before the Lords of Council and Session, with the power and privilege of naming and presenting one of the four ordinary macers before the said Lords of Council and Session, with the usual fees, salaries, and casualties of the same, together with the sum of £10, 10s. Scots money as the feu-duties underwritten of the said lands of Over and Nether Myres." Thus the Moncreiff family, after having held this privilege and right for more than 150 years, parted with it on selling the lands of Myres, to which it has always been attached, and from which it seems probable that it could not be severed. Mr. Bruce, the purchaser, bought the estate of Myres on a rental in which was calculated the £45 per annum which, as we have seen, that recalcitrant fellow Graham paid with so much ill-will and reluctance to the Moncreiff family; but it was not long before the patronage of the macership came to be exercised by its new possessors on a vacancy which occurred in 1830. Mr. and Mrs. Tyndall Bruce now represented the purchaser, and an attempt by them yet further to alienate the emoluments from their original object led to a litigation, which may be studied in the valuable and suggestive pages of the *Faculty Decisions*, vol. x.

The patrons, it seems, were seized with an ardent desire to do an act of generosity towards an old retainer which should benefit him and cost them nothing. Gardner, for that was the man's name, already held another situation, so he could not perform

the duties in person. We have examined the session papers in connection with the case, and from them information may be obtained which considerably increases our knowledge of the remarkable, we might fairly say astounding, attempt then made. When Mr. Bruce bought the lands carrying this peculiar right, the holder of the macership was a certain William Cunningham, who had been formerly a servant to one of the judges, Lord Meadowbank to wit; in 1814 this person was appointed through the influence and upon the recommendation of his Lordship, who actually became cautioner for him that he should regularly pay £45 yearly to the proprietor of the barony of Myres while he held the office of macer. On the death of Cunningham in November 1830, this surprising cautionary obligation of course terminated, but it is difficult at this time of day to imagine a state of society under which it would be possible for a member of the Supreme Court actually to become surety for the fulfilment of a bargain which literally amounted to neither more nor less than the sale of an office about the Court to a person, who was to fulfil the whole duties by another, who merely exercised certain heritable and patrimonial rights, whatever these may have been. Memories indeed are sometimes short, yet all this took place only four short years after the judges had reported on Graham's application. When William Cunningham died in 1830, no time was lost in making arrangements to fill the vacancy, and, as we have already said, the patrons were seized with a desire to benefit a person named Gardner. It seems that this man's sister was a schoolfellow of and on intimate terms with Mrs. Bruce, and a veritable novelty in the way of expedients was hit upon to afford him something substantial out of the pocket of the person who was actually to perform the duties of the macership. Gardner was in the office of the City Chamberlain in Edinburgh, and, casting his thoughts about for a suitable person, he remembered that he possessed a brother-in-law, a retired messenger-at-arms named Grant, whom he imagined he could secure at a low rate, seeing he had no work to do, and withal possessed private means. To him therefore on 11th November 1830 he indited an epistle in these terms:—"Mr. and Mrs. Bruce of Falkland having kindly placed at my disposal the office of macer in the Court of Session, now vacant, and of which they are the patrons, I hereby make offer to appoint you *as my substitute* in that office, the salary whereof is £120, but reserving to the patrons their annual rent of £45, and to myself an annual payment of £45, and granting to you *the remaining £30, exclusive of such fees as may accrue to you in the discharge of your duties*, which sums of salary are to be respectively settled and discharged by quarterly payments. It being understood that you are to perform the whole duties of the office, and also that you become bound in the event of my vacating the office, by my resignation or otherwise, that you are then to give up the appointment you are to hold as my substitute, and the

disposal of the office shall again be vested in the patrons, the same as it did prior to or at the date of this arrangement between you and me; and you further bind and oblige yourself to grant bond, with security, to the patrons and me for payment of our respective sums, if required." The answer to this proposal for what is so euphemistically called an "arrangement" came the very same day in these terms:—"I hereby accept of the offer contained in your letter to me of this date, of the office of macer of the Court of Session, at present vacant, of which Mr. and Mrs. Bruce of Falkland are the patrons, the salary of which is £120 sterling, but under the reservation to the patrons of the annual rent of £45, and to yourself of an annual payment of £45, the remaining £30, together with what fees, etc., as may accrue to me in the discharge of my duties, I retain to myself, the above sum to be settled and discharged by quarterly payments; and I also agree to perform the whole duties of the office, and that I become bound that in the event of your vacating the office by your resignation or otherwise, that I am then to give up the appointment I hold as your substitute. And I further bind and oblige myself to grant bonds, with security, for payment of the sums respectively to the patrons and to you, if required." This ingenious device, however, could not be completely carried out, as it was found that the "substitute" dodge would not hold water, so the plan adopted was to appoint Gardner's obsequious brother-in-law macer direct; and he granted on 19th November 1830 a bond to the patrons for their pittance of £45, and in this bond there occurred a clause, "that I should also pay to Henry Gardner, clerk in the City Chamberlain's office, the further sum of £45 sterling yearly, and that in the event of the death or resignation of the said Henry Gardner that I should resign the said office of macer into the hands of the said Mr. and Mrs. Tyndall Bruce aforesaid." The whole transaction reveals a most unhappy state of affairs. Everywhere there is an attempt to evade and escape through some loophole. The office of macer is degraded to the lowest depths when it becomes the subject of wretched troking and bargaining between a clerk in the office of the City Chamberlain and an ex-messenger-at-arms. To make the best "arrangement" in the pure matter of money is the whole object, while the patrons look on from their supreme height of dignity, nathless ever careful lest they too should not be quite secure in a portion of the plunder of the office. To perform the duties meant, for Grant, the smallest share of the pay, a result not infrequent where similar abuses have been suffered to creep in. Victors and others are sometimes, however, apt to quarrel over the spoil, and so it happened in this case. However much we may reprobate the repudiation of his undertaking by the oppressed brother-in-law, we cannot feel much sympathy with the oppressor, especially as his attempts to enforce the agreement let in so much light upon the negotiation of this curious bargain. When Greek meets Greek in such circumstances, there is not much scruple

in adopting any course that may be handy to overreach an adversary, and it is scarcely to be wondered at that the unhappy macer *de facto*, finding his official salary of £120 pared down by such means to £30, tried every loophole of escape, and at last flatly declined to pay Gardner, who resorted to the Court of Session in order to compel a fulfilment of the bargain. Was it or was it not *pactum illicitum*? This seems to have been the first point raised. The First Division, before whom the case came, took the opinion of the whole Court upon the question, whether the agreement in dispute was legal and enforceable. Five judges answered in the affirmative and four in the negative, and subsequently it appeared that of three judges in the First Division, two agreed with the majority of the Lords who had been consulted, and one inclined to take the view adopted by the minority. At this stage, however, some doubts were raised by counsel at the bar, whether the opinions given really could be said to decide the points at issue, because they bore rather upon the general question of the relevancy of such an obligation than upon the mode of disposing of the particular case before the Court, supposing it were ascertained that the paring-down process had reduced the emoluments of the office to such a degree as not to leave the poor man enough decently to provide for his support and proper appearance in the performance of his official duties. Accordingly, leave was given to put in a minute, from which it appeared that the total emoluments of the macership, with the addition of fees, were on an average under £140 per annum, and the defender further referred to the Act of Sederunt of 1791, to which allusion has already been made in this narrative. The Court deemed it advisable again to consult the judges. Lords Medwyn, Corehouse, Fullerton, and Moncreiff, adhering to their former opinions, came to the conclusion that in the transaction between Gardner and Grant there was nothing illegal to bar an action for implement, and they added, "Whatever may be in the power or competency of the Court, when the state of the case is made known to it,—as to which or anything to follow, we are not called upon to give any opinion,—neither the provisions of the Act of Sederunt, nor the principle of it, can afford any defence to this defender against the demand for implement of his own deliberate contract. And, indeed, while we rest our opinion on the principle already explained, we should also think that if the defender were allowed to state such a plea, or the Court should refuse implement to the pursuer, the consequence ought to be, that by thus entering into an agreement by which he secured the appointment, and then openly breaking his engagement, he rendered himself unfit to hold the office." Lords Justice-Clerk Glenlee and Meadowbank adhered to the view they had previously adopted, holding the agreement not to be legal or enforceable, and Lords Jeffrey and Cockburn agreed with them, adding certain important observations, which it may be well to

notice. Their remarks were directed to two considerations which had tended much to confirm their opinion. Firstly, then, these judges did not "think it at all clear that the 'one of the four ordinary macers' whom the proprietor of Myres acquired the right of appointing by charter of 1690, is to be considered as the *deputy* or representative of that proprietor, or that he himself, if so inclined, could claim to act and to draw fees and salary as one of the four ordinary macers, who were plainly all existing and officiating at the date of that charter." Dwelling upon this consideration, the judges point to the peculiar history of the grant of 1690, as we have traced it down, superimposed upon the original office of "serjeandrie and macerie" created in 1483. The new grant in the titles followed upon a recital of the merits and services of the Moncreiffs, but was not connected with any recognition of the ancient office, and though a *novodamus* of the old together with the new right followed, Lords Jeffrey and Cockburn considered the two as truly quite separate and distinct. No reference whatever is made to what they term the marking words, *deputy and principal*, and the use of the word *ordinary*, applied to the four officiating macers, "seems to fix upon the hereditary officer the character not of *principal*, but of *extraordinary* macer,"—an entirely different relation to that of deputy and principal. Further, the office of macer to which the owner of Myres appoints, lasts for life, and does not fall, as deputations do, by the death of the deputing person. "These views," it is added, "raise great doubts not only as to the legality of the present claim for an additional £45, but of the stipulation for the original sum." The second consideration having weight with these two judges was thus stated: "Even holding the nature of the right to be doubtful, and the old exaction of £45 to have been legalized by long-continued usage, it appears to us that the *innovation* upon that usage, attempted by the transaction with Gardner now in question, would be illegal and not actionable." The true way to test this is, it is pointed out, to suppose that on this occasion, for the first time, it was proposed to levy on this appointee an assessment of £90 a year, matters otherwise being in their present position, save that no usage existed. "To this," it is said, "the answer could not be doubtful; and yet, if it required ancient consuetude to legalize any such exaction, it appears to us that no exaction which has not the protection of such consuetude can be legal." At the final advising of the case, Lord Mackenzie took the view that the grant of 1690 was not a new one, but merely the renewal of the former grant by James III. in an effectual form, since from want of specification the original gift could not be rendered available. That being so, this learned judge considered that there really was "a power of delegation for a price paid, or in consideration of a share of the profits to be paid over by the delegate." But then it was implied that a reasonable margin must be left for the person who actually per-

Division (Manisty and Denman, JJ., *diss.* Lord Coleridge, C.J.), have held that the school board is not entitled to sue for such fees, nor indeed are they due. The question may be presumed to be one of some difficulty from the time both Courts took to consider their judgment, six weeks in the one case and five in the other. The case is deserving of attention in more than one respect. The question is of large public importance, and the practical effect of it will be that school boards in England will be compelled to enforce prepayment of the school fees. Although an English decision and relative to the English Education Acts, it is not without interest to us in this country. The provisions of the English Acts differ in some respects from those of the Scottish Acts; but the decision does not turn upon anything peculiar to the English Acts. The provisions in the English Acts from which the considerations were derived that induced the decision have their counterpart, in all essential respects, in the Scottish Acts. The case has also a purely legal interest, relating as it does to the construction of statutes and to the question how far the provision of a statutory remedy or penalty takes away, or implies the absence of, a common law remedy.

After several County Court judgments refusing their claims in such cases, the London School Board brought the present apparently as a test case. It is as ordinary a case of the kind as can be imagined. The parent, it is assumed, was able to pay, no attendance order was issued, and there was no rule of the school that fees should be prepaid. The child was sent in the ordinary way, and when the time came to pay for its past attendance, the parent did not pay and the Board sued him. These are the whole circumstances of the case.

The grounds of the judgment of the Court of Appeal are, firstly, that the Legislature has provided another means than that which the plaintiffs resorted to, the ordinary right of action, by which the Board may exact payment of the fees, and to this other means the Board's power to get payment is limited; secondly, that the sending of a child to school is not a purely voluntary act on the part of the parent, but is under a statutory obligation.

The English Elementary Education Act of 1876 provides (section 4) that "it shall be the duty of the parent of every child to cause such child to receive elementary instruction in reading, writing, and arithmetic, and if such parent fail to perform such duty, he shall be liable to such orders or penalties as are provided by this Act." By section 11, if the parent "habitually and without reasonable excuse neglects to provide efficient elementary instruction" for the child, the school board may obtain an attendance order. In case of non-compliance with this order without reasonable excuse, the Court may inflict a

penalty not exceeding 5s. including costs; and this penalty may be repeated (section 12). Section 17 says: "Every child attending a school provided by any school board shall pay such weekly fee as may be prescribed by the school board with consent of the Education Department." If the parent is unable to pay, he may apply to the poor law guardians to pay for him, or to the school board for remission. The school board may make a rule requiring prepayment of the fees, and consequently may refuse admission without prepayment. Such a rule is sanctioned by the Education Department as a reasonable exercise of their administrative powers. In *Richardson v. Saunders*, L. R. 7 Q. B. Div. 388, it was held that when the rule requiring prepayment has been made, if the child comes without the fees in his hand, and the school authorities consequently refuse admission, that is not a compliance with an attendance order, "attendance" meaning effectual attendance, and the parent may therefore be fined for non-compliance with the attendance order. The school board have in this way a means of concussing the parent into payment—prepayment—of the school fees. The Act having said nothing about the recovery of fees, and there being this method of enforcing payment, the Court has held this is the only remedy which the school board has or which the Legislature intended it to have. Lord Justice Baggallay, in delivering the judgment of the Court, said: "It was the duty of the parent, when sending his daughter to the school, to provide her with the means of paying the prescribed fees, which, by section 17 of the Act of 1870, she was required to pay, and having failed to perform this duty he did not cause her to attend the school within the meaning of the Education Acts. If the defendant's child had been refused admission on the ground that she had not brought the weekly fee with her, there was no doubt that on his continued refusal to pay the defendant would have been liable to be convicted. But no such objection had been taken, and it was not until after his daughter's attendance ceased that the defendant was called upon to pay 'arrear.' In their Lordships' opinion, the plaintiffs had no right to claim the amount of fees alleged to be due from him, and that amount was not, in fact, due from him. The plaintiffs might have prevented the child from attending the school until the defendant had paid the fees in advance, and he could have been punished by the imposition of penalties; but the provisions of the several Acts negatived any intention on the part of the Legislature that a parent should be sued as for a debt, or that recourse should be had to any means to procure the payment of fees other than the imposition of penalties for neglect to pay them. It had been evidently the object of the Legislature in passing the Acts to make the obligations upon parents to send their children to school as little burdensome as possible. The penalties for neglecting to discharge that obliga-

tion were made recoverable in a summary manner, and in no case does the amount of the penalty, with the costs, exceed 5s. If a parent were allowed credit for the fees, with the consequent liability to be sued for arrears, the burden might become intolerable; the arrears might be small, but, even if small, the cost of the proceedings to recover them would be out of all proportion to the amount at stake. It would be contrary to the whole scheme of the Education Acts that credit should be given. As to the argument that, having thought fit to send her to the school in question, the defendant was under an obligation to pay the prescribed fees, the Court assented to it to the extent that it was his duty to pay the fees in advance, but they were unable to assent to the proposition that the defendant having omitted to pay the fees in advance could be sued for the arrears."

Where by statute a summary mode of recovery is provided, that is held in general to be in substitution for the ordinary means of recovery. There is in this case, however, no summary process of recovery; what is referred to is a penalty. The question whether a penalty provided by an Act for neglect to do something comes in place of a common law right to compel performance of it or get damages for the non-performance, or whether it is merely cumulative, has been discussed in various cases, and the result of them seems to be that the penalty is not substitutionary unless this is expressly provided or very clearly implied in the Act. The same rule must apply where the right is to compel payment as where it is to compel performance of an act. We should greatly doubt whether a penalty for non-payment of school fees, which as in this case might be inflicted time after time without obtaining payment of the fees, could have been intended in place of a right to recover payment of them. But we are saved the necessity of considering such a question. In order that a penalty should be regarded as coming in place of a right of action, it is essential that they should be directed to the same thing. In this case they are not. Lord Justice Baggallay speaks of "the imposition of penalties for neglect to pay school fees." This language is inaccurate. The penalty is not for non-payment of school fees; it is for non-compliance with an attendance order, and the attendance order is for neglect of the duty of causing the child to receive efficient elementary instruction. The penalty, therefore, is for not providing efficient education. If the penalty were for non-payment of the fees, the penalty would be avoided by payment. But suppose the parent were to take the child to the school door, pay the fees, and take the child away without entering the school, the penalty would not be avoided. No doubt the school board may, if they like, work certain provisions of the Act so as by means of the penalty practically to concuss the parent into payment of the school fees, and the mode in which this may be done is pointed out in the

passage quoted. But this is a very different thing from imposing a penalty for non-payment of the fees, from the imposition of which an intention on the part of the Legislature is to be extracted.

The provisions, it is said, of the several Acts negated any intention on the part of the Legislature that the parent should be sued as for a debt, or that recourse should be had to any means to procure the payment of fees other than the imposition of penalties for neglect to pay them. Now, this plan by which parents may be concussed into payment (and it is only from this that the alleged intention is deduced) is not a plan laid down or provided by the Legislature. Any provisions from which the intention of the Legislature are to be divined must be provisions of the Legislature. But one essential part of this scheme, a part of it without which the whole thing would fall to the ground, is the rule as to prepayment, which is not made by the Legislature, on which the Legislature is silent, which is made by the school board, and which it is in the option of the school board to make or not to make as they please. How can the Legislature have intended this roundabout plan to oust the ordinary method of recovery, when it does not necessarily appear to have been in their contemplation at all? A rule as to prepayment is necessary to the carrying out this plan of securing payment. How is it, then, that the Legislature says not a word about prepayment? Then it is said, "It had evidently been the intention of the Legislature in passing the Acts to make the obligations upon parents to send their children to school as little burdensome as possible." Following out this idea, the conclusion is arrived at that "it would be contrary to the whole scheme of the Education Acts that credit should be given." It is a singular way of making the obligations as little burdensome as possible to compel people to pay in advance. Most parents have to pay the school fees out of their wages. Their wages are not paid in advance. This way of lightening the burden is therefore to make people pay out of what they have not yet got. What is meant, however, is that it is less burdensome to exact payment by a fine which with costs does not exceed 5s., than to exact it by action the cost of which may be more.

It is idle to institute a comparison of the burdensomeness of two methods of obtaining payment, one of which secures the object and the other does not. It is to be observed, moreover, that the 5s. of fine does not represent the whole expense; for if the parent is obstinate the fine may be repeated again and again, and at the dozenth infliction you are no farther advanced towards payment than when you started. It is also observed in the judgment that "the plaintiffs had no right to claim the amount of fees alleged to be due from him, and that amount was not in fact due from him." Why then does the Act speak of payment of

fees at all? Surely this is a strange state of matters, that the money is due before the education is received, so very much due that the parent can be fined when he does not pay it, but it is not due after the education is received—nay, that it ceases to become due by the education being received.

The other ground of decision is this. It had been argued that by sending the child to a board school, the parent was under an implied obligation to pay for the education. The answer made by the Court of Appeal is that the act of sending the child to a board school is not a purely voluntary act; it is done under a statutory obligation, the obligation of the 4th section to "cause the child to receive efficient elementary instruction." As a matter of fact, however, it is not obligatory to send to a board school. The obligation is complied with by sending it to a private or adventure school, or having it instructed at home by a private tutor. Apart from this, surely the statutory origin of the obligation does not entitle the parent to have it performed at the public expense. No matter what the origin of the obligation may be, once it arises the burden and expense incident to its performance fall upon the person upon whom it is laid. Further, the argument, if good for anything, cuts against forehand payment as well as after payment. It also tells against payment to a private school-master. If a parent having the statutory obligation before his eyes chooses to send his child to a private school, is he not bound to pay the school fees? Whether a child is sent to a private school or to a board school, it is equally under a statutory obligation that the child is sent and the parent acts. The truth is that there is a confusion arising from the circumstance that the school board has two different functions under the Education Acts. It has a duty to enforce the obligation of a parent to provide education for his child. But as the means of discharging this duty may in many places be scant, the Legislature has imposed on school boards the further duty of providing educational appliances. It might well have been that only the first function was imposed on the school board. In that case the parent would have been obliged to provide education the best way he could. Can any one say that he would in these circumstances have been free from the obligation to pay for the education to whomsoever he might employ? Does the circumstance that a second duty, the duty of purveying education, has been imposed on school boards, in any way free the parent from the original obligation to pay?

The decision, as we have intimated, although relating to the English Education Acts, does not depend upon any peculiarity in these statutes. The main points are that the obligation to cause the child to receive efficient elementary instruction is the creature of statute, that the school board has power to enforce that obligation by a penalty, that the school board as a purveyor of education may legitimately make a rule requiring prepayment, and

may consequently refuse admission to a child without prepayment. All these, so far as statutory, have their counterparts in the Scottish Acts. Under the Education (Scotland) Act, 1872, the parent is under an obligation to provide elementary education for his child. This obligation may be, under this statute, enforced by fine or imprisonment,—the only difference between the statutes of the two countries being, that in England, upon the neglect being proved, an attendance order is issued, and the fine follows upon neglect of this order; while in Scotland the penalty may be imposed at once upon the neglect of the statutory duty being proved, without the intervention of this intermediate step of an attendance order. (See Education (Scotland) Act, 1872, sections 69, 70, and Amendment Act, 1883, section 9.) This difference, as will be seen, is only a matter of detail. As to prepayment, neither the English nor the Scottish statutes say anything expressly upon the subject, nor has any case yet come before the Scottish Courts, like *Richardson v. Saunders*, which implies that the school board may make a rule requiring prepayment as a condition of admission. This rule is, however, obviously a legitimate exercise of their administrative powers as purveyors of education which they are entitled to make just as any private schoolmaster might; and there is an opinion of Lord Advocate Gordon and Solicitor-General Watson in 1875 (see Sellar's *Education Acts*, 7th edition, p. 210), to the effect that school boards have such a power. If any one still has a lingering doubt that there may be something peculiar to the English Acts which may have influenced the decision on which we have commented, it may be as well to note that in the recent report of the Reformatories and Industrial Schools Commission, it is recommended that clauses 11, 12, etc., of the English Act of 1876, with reference to attendance orders and so on, so largely founded on in the judgment, should be extended to Scotland.

D. C.

DECISIONS UNDER THE EMPLOYERS' LIABILITY ACT.

(Continued from vol. xxvii. p. 476.)

Notice of Injury.—Sections 4 and 7 deal with this. Section 4 provides that an action under the Act shall not be maintainable “unless notice that the injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or in case of death within twelve months from the time of death.” In the case of death, does the “within twelve months from the time of death”

refer both to the time of giving notice and the time of commencing action? This is the grammatical construction. If you regard the twelve months as referring only to the time of commencing action, that is done by making the second alternative "twelve months from the time of death" dependent upon the words "the action is commenced," which necessitates making the first alternative "six months from the occurrence of the accident" dependent on them too; in which case there is no *terminus a quo* to the six weeks for notice. To make the notice no earlier than the action is absurd, and so what appears to have been meant is that the notice must be given within six weeks from the occurrence of the accident even in case of death. In case of death, and only in that case, the want of notice is not a bar to the action, "if the judge shall be of opinion that there was reasonable excuse for such want of notice. Section 7 prescribes what the notice is to contain and how it is to be served." The notice "shall give (1) the name and address of the person injured, and shall state in ordinary language (2) the cause of the injury, and (3) the date at which it was sustained." This notice may be served on the employer "by delivering the same" at his residence or place of business, or "by post by a registered letter."

The notice must be *in writing*, *Moyle v. Jenkins* (1881), L. R. 8 Q. B. D. 116. This is not expressed in section 4; it has been held to be implied in section 7. "Section 4 prescribes no requisites for the notice, and if the clause stood alone there would be much in favour of the contention," that verbal notice is sufficient. "But section 4 not having given the requisites of the notice, section 7 does so. The terms of section 7 cannot refer to a verbal notice. All the provisions as to service through the post, etc., would be useless if verbal notice would suffice," *per* Grove, J. "The notice mentioned in section 7 must surely be the notice required by section 4, and the terms of section 7 can refer to nothing but a notice in writing," *per* Lopez, J. We cannot serve an oral communication by post, and we do not speak of "serving" such a communication. The notice, it is said, shall state in ordinary language, etc., thus speaking of the notice as some separate thing. If a verbal notice had been contemplated, the language used would have been, not that "the notice shall state in ordinary language," but that the person giving the notice shall state in ordinary language. The case of *Keen v. Milwall Dock Co.* (1882), L. R. 8 Q. B. D. 482, also shows that sections 4 and 7 must be read together, and consequently that written notice is required. It was further held in that case that if the written notice does not contain the particulars required by section 7, the want cannot be supplied by a reference in the written notice to a verbal communication or notice. In this case the workman on the day of the accident made a verbal report of

the injury to the employer's superintendent, who wrote down the particulars in writing. Afterwards the workman's solicitor wrote, stating that he was instructed to "apply to you for compensation for injuries received at your dock, *particulars of which have already been communicated to your superintendent.*" This was held insufficient. The question was raised, whether the notice which did not give particulars would have been sufficient if it had referred to another communication *in writing* which did. Lord Coleridge thought it would not. "It has been argued," said his Lordship, "that a notice to satisfy this enactment can be made by a reference in it to some other document. In my opinion it cannot. If the letter relied on in this case had referred to some written document in which the nature and particulars of the injury were given, it would not, I should have thought, have been a compliance with the words of this enactment, which describe the notice as one and single, containing in it the incidents which the statute has required it to contain as a condition precedent to maintaining any action." Lord Justices Brett and Holker, on the other hand, thought such a notice would be sufficient. "It seems to me that a notice might be available even if it should be defective in any of the matters required to be stated" (reference had been made to the proviso at the end of section 7 regarding defects or inaccuracies), "as for instance if it did not in terms name the day when the injury was sustained, but showed it by reference, so also if it did not describe the cause of the injury with sufficient particularity, but still did not describe it so as to mislead. I agree that as a general rule the notice must be given in one notice, but I am not prepared to say that it would be fatal if it were contained in more than one notice. Suppose, for example, a person in his letter written on one day should describe fully the injury he had sustained, but should leave out his address, and he should the next day send a letter stating that in the letter I wrote yesterday, I omitted to give you my address, and I now give it. If both these letters were written in time, and both served on the employer, I am not prepared to say that the last might not be taken to incorporate the first, and therefore though not an accurate but an informal notice, it might be considered a notice within the meaning of the statute. If in the present case the letter had referred to a written report and to the date and particulars there given of the injury, I should not at this stage have said that there had not been a notice within the Act, but should have desired a rule in order that the matter might be more fully discussed. The letter, however, only refers to a statement in words . . . and is therefore not a notice within the Act, which in order to be such must, I agree, contain all the circumstances in writing," *per* Brett, L.J. "I cannot say that a good notice might not be made out by one written document referring to another," *per* Holker, L.J. It may be remarked, that if the

proviso presently to be referred to, as to defects and inaccuracies, is to be brought into play to cover the case figured by Lord Justice Brett, it would not matter whether the omission were or were not supplied by another document.

Section 4 states that notice is to be given, and within what time it is to be given; section 7 states what particulars the notice requires to contain; and the concluding portion of it meets the case of inadvertent errors in stating these particulars. "A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading."

In *Clarkson v. Musgrave* (1882), L. R. 9 Q. B. D. 386, there was an inaccuracy in stating the "cause of the injury." The notice stated that the plaintiff "was injured in consequence of your negligence in leaving a certain hoist in your warehouse unprotected, whereby the said J. C. had her foot caught in the casement of the said hoist, and her foot and leg were severely injured." The jury found that the accident occurred through the negligence of a superintendent of the warehouse in allowing the plaintiff, a young girl, to go into the hoist alone. In short, the cage was sufficiently protected for persons of full age and skill, but not for persons of this girl's age. The Court held this notice sufficient. "In determining whether or not the notice of action is good, the Court cannot enter into the question of proximate or remote cause. The statute was intended for the use of unlearned persons, for whom it meant to provide a cheap and speedy remedy. . . . A notice, although defective, is still a notice under the section," *per* Field, J. In *Stone v. Hyde* (1882), L. R. 9 Q. B. D. 76, all the notice given was a letter from the plaintiff's solicitor "respecting the injuries sustained by him while in your employ on the 19th November last," and that the plaintiff was, and had been for some time, under medical treatment at a hospital, "particularly for the injury to his leg." The County Court judge held there was no sufficient notice, that the "omission of all reference to the cause of action [injury?]" was not such a defect or inaccuracy as would come within the meaning of the last clause in the section; "and even if it could be regarded as a mere defect or inaccuracy, it was such as would prejudice the defendant in his defence, and must have been made for the purpose of misleading. The Queen's Bench Division reversed, holding that the omission was a defect cured by the proviso at the end of section 7. "The point urged was, that inasmuch as the notice did not particularly describe the cause of the injury, it was not a mere defective notice, but was no notice at all. Now, when we consider that the object of the Legislature in passing the Act was to confer a benefit upon the working classes,

I think it would be unreasonable and unjust, and contrary to the spirit and intention of the Act, to require these notices to be framed with all the particularity of a statement of claim. It is urged that, assuming this to be a defective notice, the judge has found that the omission was one which was calculated to prejudice the defendant in his defence, and that the defect was for the purpose of misleading. What evidence was there of that?" *per* Matthew, J. "It seems to me that when one of the things which the section requires to be stated is omitted, the notice is a defective notice. The notice is supposed to be given by a person in a humble sphere of life, and not possessed of much knowledge. It is to be written in 'ordinary language,' that is, that the party is to use his own untutored language. If it is to be construed with rigorous strictness, the Act will be made nugatory," *per* Cave, J. In this passage there is a jumbling up of two different provisions of the section—the provision that the particulars are to be stated in ordinary language, and the provision as to defects or inaccuracies. The particulars are to be stated in ordinary language, but still they require to be stated. If a particular is not stated, and in this case the cause of the injury was not, then resort may be had for the protection of the sufficiency of the notice to the provision obviating the consequences of defects and inaccuracies. But if the particular is stated in ordinary language, there is no defect, for it is not a defect to do what the statute tells you to do. We may observe that the head-note of the case in the authorized reports is inaccurate. It says: "A notice need not be expressed in strictly technical language; it is enough that it substantially conveys to the mind of the person to whom it is given the name and address of the party injured, and the cause and date of the injury." The Court had not the opportunity of establishing by decision that the notice need not be in strictly technical language, seeing that the Legislature has declared that it shall be in ordinary language. The case went further than to decide that "it is enough to convey to the mind of the person to whom it is given" the three particulars. The notice was held sufficient, although one of the particulars, the cause of the injury, was entirely omitted. In *Carter v. Drysdale* (1883), L. R. 12 Q. B. D. 91, the notice of injury did not state the *date* of the injury. With the notice, however, a letter was sent, in which this date was mentioned. The notice of injury did not refer to the letter. It was held that the omission did not render the notice invalid, the case coming under the provision of section 7. "It is found as a fact," by the County Court judge, "that the defendant was not prejudiced, and that the defect or inaccuracy in the notice was not misleading; and I do not see how the judge could come to any other conclusion, because in a contemporaneous document sent to the defendants, the date of the injury was stated. I think it is sufficiently clear upon a reasonable construc-

tion of the Act, that the omission of the date was a defect or inaccuracy in the notice within the meaning of section 7," *per* Lord Coleridge, C.J. This case shows how the provision at the end of section 7 may render it unnecessary to determine the question raised in *Keen's* case as to the sufficiency of mention of the particulars by reference to another document. Suppose the notice in this case had referred to the other document which was sent within the time for giving notice, the notice, according to Lord Coleridge's view in *Keen's* case, would not be the notice required by the Act, but the provision as to defect or inaccuracy would render the omission innocuous.

These cases of *Stone v. Hyde* and *Carter v. Drysdale* show the liberal view the Court is disposed to take of the provision as to defect and inaccuracy, and they dispose of a doubt which might have been raised as to the extent of its application. The provision refers to "defect or inaccuracy therein," that is, in "a notice under this section," which is a notice stating certain particulars. Does the defect or inaccuracy referred to mean a defect or inaccuracy in stating one of these particulars, or does it go farther and cover a defect which consisted in omitting a particular altogether? These cases, in one of which the cause, in the other the date of the injury were omitted, show that the ampler view of the construction of the provision has been taken.

Suppose *all* the particulars, name and address of the injured person, cause and date of the injury, were omitted, would the provision apply? Could a notice which gives none of the particulars which the section requires, and which it is its object to require, be deemed a "notice under this section"?

There is one defect which this provision could not cure. The injury itself must be mentioned. The notice, it is said, is not to be deemed invalid "unless the judge who tries the action arising from the *injury mentioned in the notice* shall be of opinion," etc. Until there is before him a notice mentioning the injury, the judge's power of "being of opinion," etc., which it is intended he may have to exercise, cannot come into play.

(*To be continued.*)

GUARDIANSHIP AND CUSTODY OF INFANTS BILL.

THIS Bill, introduced by Mr. Bryce, and which has on the back of it besides his name the names of Mr. Horace Davey, Q.C., Mr. George Anderson, and Mr. Staveley Hill, Q.C., was read a second time in the end of March. The second reading was assented to on the understanding that material modifications would be made in

Committee, and that the Bill would be weeded of the provisions to which very general objection had been taken. The main purpose of the Bill is the abolition of the sole guardianship of the father, and the substitution for it of a dual control by both parents; and it was to this that was directed most of the criticism, to which it is understood effect is to be given. Mr. Bryce stated that he was not "wedded to any particular form of the Bill, and that if it got into Committee he was willing that the House should make of the measure what it liked." To give as a reason for assenting to a condition that objections shall be given effect to which are to the essence of the measure, an indifference as to the particular form of the Bill, is an adroit way of putting the matter.

There are grave general objections to the proposals in the Bill, and there are some special ones in so far as these proposals affect the law of Scotland, with both of which we shall deal.

Public attention, especially in Scotland, has been directed of late to one matter in which the existing law as to the custody of children requires amendment. It relates to the case of the separation of husband and wife. The Court has in such a case a discretionary power to give directions as to the care and custody of the children; but in exercising this discretion, the principle which has guided the Court has been the *patria potestas*, and it has acted on the theory that the father has the primary right to the child. The Court has held so firmly to this principle, which may be right enough and may work well enough in the normal relations of husband and wife, that even where the separation has been decreed by the Court solely on account of the fault of the husband, the Court gives the custody of the child to the father, and indeed takes it away from the mother unless there is something in the character or conduct of the husband that renders him unfit, having regard to its health or its morals, to be entrusted with the care of the child. A marital fault is not held enough to deprive him of the paternal right. This state of matters is to our thinking indefensible. When the child is of tender years, it is harsh to the mother and it is injurious to the child. It deprives the mother of a natural solace, it deprives the child of the appropriate natural care and guidance. When husband and wife are living in the unnatural and exceptional condition of separation, we are forced to make a formal distribution of rights and duties; and in doing so, the safest guide is a regard to the order which exists in a family in its normal condition, that is to say, where the husband and wife are living together. What happens then? The husband attends to his work; the wife attends to the house and the children. Taking the case of mere separation, apart from any complications of fault on either side, it seems to us therefore that the custody of young children should be given to the mother. It comes natural to a woman to take care of children; it does not come so natural to a man. So much as regards the welfare of

the child, which is the main consideration no doubt, but not the only one. We ought also to look at the matter as it affects the feelings and interests of the parents. In the matter of the disposal of the children, pain must fall somewhere when the parents are living apart; and all that can be done is to minimize the amount of it by making it fall where it may least hurt. Clearly the pain of being separated from a young child must be greater to the mother than it is to the father. For both these reasons, the law in this respect, we think, requires alteration, and it is this state of matters which has been emphasized as the reason for the alteration proposed by this Bill. It would be very easy to remedy this defect in the law or in the administration of it by a very short Act directing the Court to exercise the discretion which it already has in the way we have indicated. But what remedy does this Bill propose to apply? Section 5 says: "Where any question shall arise as to the custody of an infant whose parents are living separate from one another, or as to the religion in which it is to be brought up, the Court shall have power to make such order as it may think fit regarding the custody of such infant or the religion in which it is to be brought up." (Here we may interject the remark that, so far as the case of a mere child is concerned, it does not much matter what order is given as to its religion. The religion will follow the custody. Give the custody to a Catholic mother, and the child will be brought up a Catholic, whatever order the Court may pronounce.) This provision is of itself of little importance, the Court having already a discretionary power, and the objection being only to the manner of its exercise. All that was needed was an alteration *in such cases* of the exclusive paternal right. The instruction on which the Court is to act in exercising this discretion is to be found in section 7, which abolishes the exclusive paternal right in all cases, even when the parents are living together. Section 2 says: "The parents of any infant shall during the continuance of their marriage be its joint guardians." The objection to this is, first, that the remedy overlaps the evil to be remedied; and secondly, that the cure is worse than the disease. It is alleged avowedly to be with a view of giving a lead to the Court in the exercise of their discretion when the parents are living apart that this innovation on the rights of fathers generally is proposed, and the evil of the present state of the law in regard to an exceptional state of circumstances is made the pretext for revolutionizing the economy of the family in its normal condition. It has already been stated how much smaller an alteration would meet the case. As for the second consideration,—when the family is united, the *father* as head of the house is the natural guardian of the children. There is the further obvious objection, that a dual control never works well. There must be a supreme power of determination somewhere. In case of any difference of opinion that may arise when

the parents have joint and equal powers, the determination would, we presume, have to rest with the Court. Deplorable as would be a resort to the Court, the Bill does not provide even this or any other means of settling a dispute between the joint guardians. It seems to us that to give equal powers to the spouses would be to give an opportunity for, and a cause of, dissension. A general alteration is proposed to be made for a partial evil, and in endeavouring to provide for an evil occurring where the spouses are living separate, there is introduced such a source of contention in cases where they are living together as might lead to separation.

Section 3 provides that "on the death of either parent the survivor shall be the guardian." If the mother were the survivor, she would be sole guardian, to the exclusion of the testamentary tutor appointed by the father, or even the guardian appointed by joint-deed of the parents under section 4 of the Bill. So far at least as the estate of the pupil is concerned, it is extremely doubtful if the mother is a suitable person to be sole guardian, or guardian at all. Take the case of a young widow left with some infant children. Is she possessed of the habits of business required for managing the pupil's estate, investing money, or letting lands? and if she be, is not her time sufficiently taken up with the personal care of the children? The considerations as to the proper function of the mother, which have induced us to advocate the committal to her of the personal care and custody of the children, induce us to oppose this part of the scheme which entrusts her with the whole powers of a guardian.

At present it is only the father who can appoint testamentary guardians to the child. In consistency with the cardinal principle of the Bill, the dethronement of the father, this rule is altered, but the alteration made in some respects loses sight of the new principle. Section 4 says: "The parents of any infant who is unmarried at the time of the death of the survivors may, by deed executed by them, appoint a guardian after the death of the survivor; and in default of such appointment or failure to take effect, the survivor may by deed or will appoint a guardian for such infant; and in default or failure of such last-mentioned appointment the guardian, if any, appointed by the will of the predeceasing parent shall be guardian." Suppose there is no joint appointment, but there is a separate appointment by each spouse, the guardianship after the death of both would be determined by the accident of which spouse happened to live longest; and this guardian appointed by the parent who chanced to be the survivor would be sole guardian, to the exclusion of the guardian nominated by the predeceaser. In such a case, what comes of the principle of equal authority? This clause shows how loosely constructed the Bill is. There is a qualification, however, upon the above provision: "Where an infant on the death of the father becomes

entitled to any real or personal estate, any guardian appointed by the father's will shall be a guardian of the estate of such infant jointly with the mother." Does this refer only to the case of the minor succeeding to property from the father? It is on the father's death that the minor becomes entitled, but he may become entitled on that event to property which was not the father's to dispose of, or which the father never possessed. Then the mother is to be joint guardian of that estate whatever it is. At present anybody leaving property to a minor may appoint a guardian to such property. This guardian would be the sole guardian. The Bill proposes to alter this only in the case of a father who would in this respect have less power than a stranger.

We have stated some objections to the main principle of the Bill, and to the haphazard manner of its development. But there are also special objections to the Bill, regarding it solely as a measure affecting the law of Scotland. It is obvious that in making any change upon the law, it is necessary to frame the alterations so as to make them fit in to the existing law upon the subject, and to preserve the existing nomenclature. The law of England and the law of Scotland upon the subject of guardianship are not the same. There is the very salient difference, that in Scotland we divide nonage into two periods,—pupilarity (ending at fourteen in the case of males, and at twelve in the case of females) and minority, a division not recognised in the English law. It is very obvious that great circumspection must be used in framing the provisions of one Bill intended to apply to two systems of law having this marked dissimilarity. We can scarcely say that in this Bill there is even an attempt to meet this difficulty. All that is said is, that "in the application of this Act to Scotland, the word 'guardian' shall include 'tutors,' and the word 'infant' shall include 'pupils'" (section 7); and that "in the construction of this Act the expression 'the Court' shall mean in Scotland the Court of Session" (section 8). The Bill evidently had been prepared having a view solely to the existing English law, and after the thing was complete, it had occurred to the framers of the measure that the Scottish law had the peculiarity of dividing "infants" into two classes, pupils and minors. Accordingly, it was thought necessary to provide for this distinction by sticking on this little patch—section 8.

Unfortunately we cannot adapt the provisions of a purely English Bill to our Scottish system of law in this short and easy fashion. In the first place, it is not very easy to say what is meant by section 8. We presume the intention was to make the Bill apply, so far as Scotland is concerned, only to pupils and their tutors. We presume this because, except on this assumption, the insertion of the clause is meaningless. But if this was the intention, the intention is conveyed in as clumsy a manner as can be imagined. Why was it not said, "in its application to Scotland

the word 'guardian' shall *mean* 'pupil,' and so on"? Instead of this, it is said "guardian shall include pupil." "Include" does not naturally mean "include only." In *ex parte Ferguson*, L. R. 6 Q. B. 291, Mr. Justice Blackburn says: "The argument is one which I have heard very frequently, viz. that where an Act says certain words shall include a certain thing, that the words must apply exclusively to that which they are to include. That is not so." If in the interpretation of the interpretation clause it should be held that the term "include" did not mean "include only," and that the Bill applied to both classes of guardians—tutors and curators—we should be landed in the following unexpected result. Section 6 gives to guardians the powers over the person and estate which guardians have under the English Act, 12 Charles II. c. 12, or otherwise. Under that Act guardians have the custody of the person of the ward until twenty-one. The effect of the Bill would therefore, on this reading of it, be to give to curators power over the person of the minor, a power which in Scotland no guardian of any kind of a *minor* has at present.

Assuming, however, that the Bill is intended to apply in Scotland to pupils and tutors only, not to minors and curators, the want of any provision being made in the Bill for the peculiarity in our Scottish law referred to, lands us in other results, both absurd and unintended. When both parents are alive, according to section 2 the mother would be joint guardian with the father so long as the child was in pupilarity. When the boy became fourteen, or the girl twelve, our existing law as to minority remaining untouched, the mother's joint guardianship would cease, and the father would be sole guardian.

It is also to be recollected in this connection, that, according to our existing law, it is only the father who can appoint a curator for a child after his death; the mother has no such power. Taking this principle in conjunction with the provision of section 3 above quoted with reference to the power of testamentary nomination, we arrive at a curious result. Suppose both parents die while the child is in pupilarity, the mother being the survivor, and each leaving a separate nomination of a guardian (tutor and curator). On the father's death, the mother would be sole guardian to the exclusion of the father's nominee; on the mother's death, the mother's nominee also would be sole guardian to the exclusion of the father's nominee; but on the boy arriving at fourteen, or the girl at twelve, the father's nominee would be sole guardian to the exclusion of the mother's nominee. What in such a case comes of the principle of joint-guardianship, or for that matter of any principle?

REPORT ON THE BERNE INTERNATIONAL COPYRIGHT
CONFERENCE, 1883.

By C. H. E. CARMICHAEL, M.A., Foreign Secretary, Royal Society of Literature, Member of the English Committee, International Literary Association.

(From *Transactions*, Social Science Association, 1884.)

IN order to make the following report generally intelligible to our members, I embody the salient points of my letter of October 9, 1883, to the Chairman of Council, at the Huddersfield meeting, as far as they bore on the history of the Draft Convention herewith submitted.

The International Literary Association, founded in Paris in 1878, at a Congress held under the presidency of Victor Hugo, Ivan Turgenieff, Edmond About, and other distinguished men of letters, lately confided to M. Torres Caicedo, Minister from the Republic of San Salvador to the Courts of St. James and Paris, the presidency of a Committee charged with drafting a model form of International Convention for Literary and Artistic Copyright.

This model was to be discussed at a meeting convened for the early autumn of 1883 in Berne, under the auspices of the Helvetic Confederation, and to be subsequently adopted by the Congress of the International Literary Association, fixed for 1883 at Amsterdam. Both these meetings have now been held; the Berne Draft Convention has been adopted, as a sort of maximum of *desiderata*, by the Amsterdam Congress, and the Helvetic Confederation has, by a Circular Letter of December 3, 1883, taken steps for bringing the Draft to the notice of the several States, as a basis for a Copyright union on the model of the Postal, Telegraph, and Trade-Mark unions, already so successfully established.

Having said thus much by way of explanation of the history of the Berne Conference, I proceed, in accordance with the terms of my letter to the Council at Huddersfield, to submit to our members some account of the propositions embodied in the text of the Berne Draft. But I have found no little difficulty in giving a brief *résumé*, which shall at the same time be faithful and intelligible, of discussions ranging over so wide a field as that of the Berne Conference. The very title of the proposed Convention furnished matter for keen debate.

M. Clunet, editor of the *Journal du Droit International Privé*, of Paris, who has visited us in our own home, and spoken on the subject of International Copyright at a London meeting of the Law Amendment Society, desired the insertion of the epithet

"scientific," in addition to that of "literary," in the title, which would then have stood as "Projet de Convention pour constituer une Union pour la Protection des Œuvres Littéraires [Scientifiques] et Artistiques."

I must confess that on this point I share the conviction of the majority of the Paris Committee, as expressed at Berne by M. Pouillet, to the effect that the epithet "scientific" was not required, and that the title chosen by the Committee was simpler, and more in accordance with precedent, without that addition. But I can scarcely understand the doubts of a member who inquired at Berne if a treatise on chemistry or physics would be protected by the expression "works of literature." I should have thought the affirmative too obvious to need statement. The inclusion of the epithet "scientific," which I therefore place within brackets, was eventually rejected by 11 to 8, out of 25 votes.

Articles I. and II. of the Paris Draft, submitted to the Berne meeting, were fused at Berne into a new Article I. in the following terms:—

"Les auteurs d'œuvres littéraires et artistiques parues, représentées ou exécutées dans l'un des Etats contractants, à la seule condition d'accomplir les formalités exigées par la loi de ce pays, jouiront, pour la protection de leurs œuvres dans les autres États de l'Union, quelle que soit d'ailleurs leur nationalité, des mêmes droits que les nationaux."

It will be observed that the place of publication or representation, and the fact of its being within a State of the proposed Union, is the point of capital importance for copyright under the Berne Draft. The third article of the Paris Draft, having now become Article II. for the purposes of the Berne meeting, was adopted as proposed by the Committee, an amendment by M. Clunet being rejected. The text of Article II. runs thus, and it is, in point of fact, simply an interpretation clause:—

"L'expression 'œuvres littéraires ou artistiques' comprend : les livres, brochures ou tous les autres écrits ; les œuvres dramatiques ou dramatico-musicales, les compositions musicales avec ou sans paroles, et les arrangements de musique, les œuvres de dessin, de peinture, de sculpture, de gravure, les lithographies, les cartes géographiques, les plans, les croquis scientifiques et en général toute œuvre quelconque, littéraire, scientifique et artistique, qui pourrait être publiée par n'importe quel système d'impression ou de reproduction."

We here meet with the epithet "scientific," and its insertion amply answers any such doubts as were raised with regard to the protection of scientific treatises. Photography, it was stated authoritatively, was designedly omitted from the text. Thus the question lately raised in a recent *cause célèbre* in our Courts

(*Nottage v. Jackson*, L. R. 11 Q. B. D. 627), as to the "author" of a photograph, is not one for which the Berne Draft Convention offers any solution. Article III. of the rearranged text enacts the rights of authors over manuscript and inedited works:—

"Le droit des auteurs s'exerce également sur les œuvres manuscrites ou inédites."

Article IV., which was passed *nem. con.*, enacts the rights of heirs and legal representatives of authors:—

"Les mandataires légaux ou ayants cause des auteurs jouiront, à tous égards, des mêmes droits que ceux accordés par la présente convention aux auteurs eux-mêmes."

Article V. is the result of a fusion of two articles of the Paris Draft, and declares the extent of the author's rights:—

"Les auteurs ressortissant à l'un des Etats contractants jouiront, dans tous les autres Etats de l'Union, du droit exclusif de traduction pendant toute la durée du leur droit sur leurs œuvres originales."

"Ce droit comprend les droits de publication, de représentation ou d'exécution."

On this article an amendment, proposed by Prof. Teichmann, of Basle, limiting the author's right of translation to ten years from publication (as in some of the latest treaties, *e.g.* Franco-German, 1883), was lost by 17 to 4.

After considerable discussion, manifesting the existence of conflicting views, this article, the adoption of which in any International Convention would sensibly alter the current of general Diplomatic practice on the question of translation in Copyright Treaties, was passed in the form already recorded.

Article VI. gave rise to no discussion, being, indeed, rather of the nature of a self-evident proposition than of an article in a Diplomatic Convention.

"La traduction autorisée est protégée au même titre que l'œuvre originale."

"Lorsqu'il s'agit de la traduction d'une œuvre tombée dans le domaine public, le traducteur ne peut s'opposer à ce que cette même œuvre soit traduite par d'autres écrivains."

Article VII., dealing with infractions of the prescriptions of the proposed Convention, and assuming to be simply declaratory of the necessary competence of the local courts, passed without debate.

"En cas d'infraction aux prescriptions qui précèdent, les tribunaux compétents appliqueront les dispositions, tant civiles que pénales, édictées par les législations respectives, comme si l'infraction avait été commise au préjudice d'un national."

"L'adaptation sera considérée comme contrefaçon et poursuivie de la même manière."

It appears to me, however, now, as it did on reading the original text of the Draft, that there is a certain ambiguity of expression

in this article, and that it might *e.g.* be held to give a Frenchman and an Italian right of action in English Courts for a piracy committed on a French or Italian work in Switzerland, supposing the several countries to have become States of the proposed Copyright Union. I do not assert that this is what the framers meant; I only think it right to draw attention to the interpretation of which I believe the text is patient.

Article VIII. enacts the retrospective force of the Draft Convention :—

“La présente Convention s'applique à toutes les œuvres non encore tombées dans le domaine public, dans le pays d'origine de l'œuvre au moment où la dite Convention entrera en vigueur.”

It is an addition to the Paris text, and gave rise to no little discussion at Berne, being finally passed, after an amendment limiting the retroactivity to the country of origin.

Article IX. reserves the rights of the several States to make agreements *inter se* :—

“Il est entendu que les Etats de l'Union se réservent respectivement le droit de prendre séparément entre eux des arrangements particuliers pour la protection des œuvres littéraires et artistiques, autant que ces arrangements particuliers ne contreviendraient point aux dispositions de la présente convention.”

Article X. of the latest form of the Draft was, without discussion, voted as Article VIII. It is purely of an administrative character, but embodies a new and useful feature in Copyright Conventions, if carried out, in the shape of the proposed authoritative collection of the Copyright laws of the several States of the Union.

“Il sera établi un bureau central et international, auquel seront déposés, par les soins des gouvernements des Etats de l'Union, les lois, décrets et règlements déjà promulgués, ou qui le seraient ultérieurement, concernant les droits des auteurs.

“Le bureau les réunira et publiera une feuille périodique, rédigée en langue française, où seront contenus tous les documents et renseignements utiles à faire connaître aux intéressés.”

It does not clearly appear on the surface of Article X. whether the laws are to be translated into French or published in the original tongue. If they are to be translated, it is obvious that the translations must be authenticated by the several Governments, in order to be of any value.

An attempt to reopen the debate on Article V., on the question of the right of translation, was put to the vote after the article had been accepted. The proposed amendment and fresh discussion were alike negatived by 11 to 6.

The articles above recited were then put to the vote *en bloc* and carried unanimously. Whatever may be the degree of acceptance hereafter accorded to them by the European Concert, the articles of the Berne Draft Convention clearly deserve the most careful

attention of all who are interested in the progress of Thought on the subject of International Copyright.

Reviews.

Institutes of the Law of Nations : A Treatise of the Jural Relations of Separate Political Communities. By JAMES LORIMER, LL.D., Advocate, Regius Professor of Public Law in the University of Edinburgh, etc. Vol. II. London and Edinburgh: W. Blackwood & Sons. 1884.

WE had the pleasure in our number for March of last year of noticing Professor Lorimer's first volume, and now we have the second, which completes the work. Having concluded in the former volume his treatment of the relations of separate States in a condition of peace,—of independent political entities in their normal jural relations,—he now proceeds to regard them in relation to each other in a state of war,—that is to say, in their "abnormal jural relations." The latter expression would appear at first sight a contradiction in terms, but it expresses in reality that state of things in the body international which corresponds to disease in the body physical. The passage from the study of the normal to that of the abnormal jural relations of States is one, as it were, from jural physiology to jural pathology. For international jurisprudence is a science of therapeutics, and like its medical analogue investigates the phenomena of disease with a view to their removal. Its object when viewed as an art is the reduction of the abnormal to the normal. As the only medical object of the diagnosis and treatment of disease is its extirpation, so the only jural object of the recognition and study of war is its abolition. The appeal to the sword is the surgical operation which removes the obstacle to a return to the state of health.

The view of the rights of a State, as an individual among States, being identical with that of the individual among persons, namely, the right to exist and energize to the limit of its natural capacities,—a right which may be comprehended in the word freedom,—and the aim of international jurisprudence being the attainment of such freedom, this must also in the eye of international jurisprudence be the sole object of war regarded as a jural factor; and it can only become a means to this end when it is the only means left—when the last resource is an appeal to that ultimate tribunal of nations whose presiding judge is the "God of Battles." The author thus rejects what he calls the military doctrine of war, which views it as a productive industry, whereby results—chiefly moral—in the growth of nations and individuals are reached,

which would be otherwise unattainable. As the central doctrine of international law, in the sphere of the normal relations, is recognition, so in that of the abnormal it is intervention, and these two are virtually exclusive opposites; and to fix the conditions of the one is, conversely, to fix those of the other. These two, then, with the supplementary doctrine of neutrality, which Professor Lorimer, differing from Bluntschli and other jurists, classes with the abnormal and not with the normal relations—constitute the *corpus juris inter gentes*. Postulating the rule that war justifies the application only of the minimum of physical force and material expenditure, the author proceeds to consider in detail the means which may be used in waging it. In this regard we think he has based the seizure of private property by belligerents on a firm foundation. It is a maxim of international law, that it is only public rights which can be lawfully invaded by belligerency. Under this assumption private property would be free from its grasp; but the private property of citizens is liable to be taken for public purposes by their own Government, on payment of compensation to the owner. When an invader demolishes a house and lays waste an orchard to erect a battery, or requisitions a farmer's horse and cart, he is doing only what the owner's own Government has a legal right to do, and he exercises his right as victor to impose upon the vanquished State the duty of making a compulsory purchase of the property which he has seized, and handing it over to him as part of the expenses of the case, which are always awarded to the successful litigant.

The author is a strenuous defender of the practice which is now so vehemently denounced by nearly all foreign jurists, except those of France, for obvious reasons, of the seizure of private property at sea. "Suppose," he says, referring to the above legal fiction of compulsory purchase, "the object to be a ship, the ship is here regarded as occupied territory, and the belligerent appoints the captain or supercargo to represent his State by purchasing the ship and applying it to belligerent uses, just as, in default of a municipal tax-gatherer, he appoints another in his place to collect the revenue and apply it to the ordinary purposes of civil government, or to the payment of such requisitions as he may find it necessary to impose." He further justifies his position on the ground that war on commerce is more economical from a jural point of view than war on life. "The tender hearts of Americans and Germans," he says, "recoil from the notion of sinking precious bales of cotton in the sea, but they did not shrink from covering their fields with the bleeding bodies of thousands of their own fellow-citizens not many years ago." The capture of merchandise at sea is, so far as the appliance of warlike methods go, a matter purely of form. There is no bloodshed, because there is no resistance; there are no women and children in the way, no fields to lay waste, and no homesteads to burn, and its result is the

speedier crippling of the resources of the enemy, and consequent hastening of the return of peace.

Professor Lorimer's ethical view of the rights and duties of nations, leads him to extend the province of intervention and to narrow that of neutrality. War is an evil, and neutrality is at best but letting ill alone, which, ethically, the individual, and, jurally, the State, is not at liberty to do, if it can help it. The duty of a State in the case of a war between two other States is, according to him, like that of a man who finds two of his friends taking to fisticuffs in his presence—the obvious one of interference to stop them.

On the question also of the relation between private citizens of neutral States and a belligerent State, Professor Lorimer occupies a definite position of his own. The hands of the neutral State in its public capacity are tied by its proclamation of neutrality, but the citizens of that State in their private capacity are at liberty to enlist in the armies of either belligerent, and to trade with either belligerent State in its public capacity without restriction. In regard to freedom of trade, the author's own doctrine is at variance with the accepted law of nations. He would make no distinction between ordinary goods and what is known to recent treaties as contraband of war. To draw the line defining munitions of war, he argues, at the mere instruments of killing is only haphazard. Provisions, or shoes and stockings, might be as urgent a need of either army, and as directly contributing to its victory or vanquishment, as guns or gunpowder; or, to use the author's own illustration, if the one belligerent be in need of salt and the other of saltpetre, the neutral who supplies the former and refuses the latter, commits as much a breach of neutrality, and his act is as much an act of partisanship, as if he had furnished the saltpetre to one and withheld it from the other when both were lacking it. The result of the author's premises is, that between the neutral citizen in his private capacity and the belligerent State, there exists free trade in everything, including soldiers, ships, and arms. Each belligerent has a right to the markets of the neutral world for what he wants to carry on his litigation in the ultimate court of nations, and to close it to him for certain articles which he may want, while keeping it open to him in certain others, of which he may not be in need, is to commit a non-neutral act. It will be obvious that these views bring the author into collision with certain adopted rules of international law. His theory of free enlistment is not that of our Enlistment Acts. His theory of free trade in ships and arms with belligerents is not that of the Rules of Washington, which were allowed by this country to govern that now generally discredited transaction, the settlement of the Alabama claims.

As a scientific jurist, Professor Lorimer looks to a goal—the solution of the ultimate problem of international jurisprudence,

which is, "How to find international equivalents for the factors known to national law as legislation, jurisdiction, and execution?" One half of the text of the volume is occupied with a review of previous attempts at a solution, explanations of the failure of these, reasons for holding that the problem is not insoluble, and the submission of a scheme of his own. Though professing to entertain no hope of seeing a solution within as yet anything like measurable distance, and while acknowledging that any offer of a solution at the present time can be only tentative, he points to the fact that the analogous problem, which in primitive times must have appeared equally insoluble, of the attainment of a means towards the peaceful and bloodless adjustment of differences between man and man, has been—with such trifling exceptions as the duelling of German students and French journalists—successfully solved, at least among civilised men. The onus of proving the international problem insoluble lies on those alleging its insolubility.

The closeness of the reasoning throughout the work demands a corresponding closeness of mental attention, but, that secured, there is no writer who is easier to read and to understand than Professor Lorimer. An excellent feature of the book for the student is the italicised propositions which at intervals state succinctly the leading doctrines of the work. The appendix, which occupies a considerable part of the volume, exhibits certain international documents which are not to be found collected elsewhere. There are also two chronological tables, one of important international events, and another of political changes in Europe. While grateful for what is given in these, it might not be hard, were one captiously inclined, to point out omissions; and the battles in our rebellions, Jacobite or Irish, do not—on the author's own rule that rebellions, until, through the extension of belligerent rights by a neutral to the rebellious combatant, they come within international cognizance, are not subjects of his science—rank as international events. And, by the way, it was not with the *Tuscarora* (p. 101), but with the *Kearsage*, that the Alabama had her ultimate conflict.

Handbook to the Parliament House. By J. BALFOUR PAUL.
Edinburgh: William Green. 1884.

MR. BALFOUR PAUL, advocate, treasurer to the Faculty, acting under the sanction of that learned body, has produced in a most convenient form a book which will prove very generally useful. The Parliament House—perhaps the most truly national institution retained by Scotland—rich in treasures of literature and art, and endeared to every Scotsman by its historical associations, has hitherto been without a guide-book. By the numerous class

of tourists who year by year perambulate the floor of the Outer House, examine its paintings and windows, and penetrate into the somewhat gloomy recesses of the adjoining library, this little volume will be warmly welcomed. There is also another class, those who are forced by the "law's delay" to spend many a weary hour within call of the macer, whose time may pass at once pleasantly and profitably under Mr. Paul's guidance. They can have no difficulty in going over the whole buildings with the assistance of the plan here provided, while the sectional views, by an admirable system of references to the accompanying letterpress, will enable them to find out every object of interest which the great Hall contains. There is a short account of the subject of each portrait and bust, containing just those facts which the intelligent visitor would wish to learn. The past history and present arrangements of the Court of Session are also briefly sketched; and Mr. Paul then concludes with notices of the Advocates' and Signet Libraries. He has been very successful in bringing within an exceedingly small compass a great deal of information. His handbook may well serve as a model for works of this description.

A Manual of the Law of Real Property. By CHARLES T. BOONE.
San Francisco: Sumner, Whitney, & Co. 1883.

If any lawyer could find it in his heart to commend to the unwary layman a treatise in the nature of a *Vade Mecum*, or "Every Man his own Lawyer," this would be just the sort of booklet he would choose. It is tiny, beautifully bound in that law calf which Americans affect, well printed, well indexed, handy in every respect. Being a treatise on English law as adopted in America, with special reference to the odd inversions of principle which have arisen out of the novel, if not abnormal, relations which obtain in the Far West, there would be much presumption in attempting to appraise the value of the bulk of the work. But much of its contents does not depend for its interest on Anglican methods; and a dip here and there into this section of the universal gives one a high estimate of the care with which the short paragraphs have been compiled. This is not to say that the whole law on these matters is set out within the four corners of the manual. That would be impossible. But what is said is what most needs saying, and it is said in the most direct, most intelligible, and least technical style. If there be a limit to the routes traversed, the traveller is carefully guided so far as the author conducts him, and the end is neither a precipice nor a quagmire, but that straight, sandy track which in the States takes the place of the Queen's highway. Can anything more favourable be said concerning a pocket companion?

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF FIFESHIRE.

Sheriff-Substitute READMAN and Sheriff CRICHTON.

FORTUNE v. NORTH BRITISH RAILWAY COMPANY.

Railway Company—Deduction of Weight for “Runnage”—Custom of Trade.—The following interlocutors explain the circumstances of the case :—

“*Cupar, 5th July 1883.*—The Sheriff-Substitute having heard evidence adduced and parties’ procurators thereon, and considered the whole cause : Finds in fact that the pursuer delivered to the defenders at their station at Kilconquhar, for the purpose of carriage, certain quantities of potatoes on various dates between the 21st of November 1882 and the 13th of February 1883 inclusive, for which the defenders’ agent at said station granted receipts : That the quantity of potatoes so delivered is stated in said receipts to amount to 63 tons 8 cwt. 2 quarters : That the said station-agent at Kilconquhar, before entering in said receipts the weight of the potatoes, had, according to instructions received by him from headquarters, allowed a deduction from the weight actually shown by the steelyard of 1 cwt. per ton for ‘runnage,’ and that the weight shown in the said receipts are accordingly understated by this amount : That this deduction was not intimated in any way by the defenders to the pursuer, who was not aware of its having been made until the month of March 1883 or thereby : That it is the pursuer’s practice, and the general practice of farmers in Fife, to settle with purchasers of potatoes upon the weights as shown by the receipts granted by the defenders, and that the defenders were aware of this practice ; and that the average value of the said potatoes at the time in question was £4 per ton : Finds in law that the pursuer has suffered loss by the defenders’ actings to the extent of four shillings per cwt., deducted by them as above set forth, amounting on the 63 cwt. so deducted to twelve pounds twelve shillings sterling : Decerns and ordains the defenders to make payment to the pursuer of said sum, with interest thereon at the rate of five per centum per annum from the 24th day of April 1883 till payment : Finds the pursuer entitled to expenses : Allows an account thereof to be given in, and remits the same, when lodged, to the auditor to tax and report.

(Signed) “GEO. READMAN.

“*Note.*—In this case the defenders admit that the deduction complained of was actually made during the time in question without any intimation thereof being given to the pursuer ; and they say the deduction was reasonable and necessary, and that their practice of making a deduction to some extent was well known in the potato trade. The defences mainly relied on were two—(1) that there was no privity of contract between the pursuer and defenders ; and (2) that the receipts granted by the defenders bore the words, ‘weight not guaranteed,’ and cannot therefore found any claim on the ground of their inaccuracy.

“On the first ground, while it is true that the defenders were carrying the potatoes for the purchasers who paid the charge for carriage, it is

also true that they received them from the pursuer, and in exchange handed to him a receipt which professed to state correctly the weight of potatoes received. Alexander M'Neill, railway porter at Kilconquhar, took part in the weighing of the pursuer's potatoes; he gave the station-agent a note of the weights, and the station-agent furnished the receipts. M'Neill adds—"The receipts are used to let senders of potatoes know their weights, and to enable them to settle with the buyers." It now appears, and is not disputed, that during the whole time in question the defenders made a practice of understating by 1 cwt. per ton the weight of potatoes actually entered by them in the receipts handed to the pursuer, and the question is, Were they justified in so doing? In the Sheriff-Substitute's opinion they were not. It seems to him that the pursuer was entitled to assume the accuracy of the receipts failing any intimation to him of the contrary. The receipts were taken from the defenders to enable the pursuer to settle with his purchasers, and if the defenders intended not to give the exact weight, it was the duty of their agent, in terms of rule 87 of the defenders' general instructions of 1st January 1881, to warn the pursuer that the weights stated in the receipts were not to be relied upon for the purpose of buying and selling. No such warning was ever given, and as the mis-statement in the receipts was the direct cause of loss to the pursuer, he is entitled to reparation. Further, it appears to the Sheriff-Substitute that the deduction which the defenders instructed their agents to make was an arbitrary and unreasonable one, inasmuch as it was applicable to all potatoes whether clean and dressed, as the pursuer's were, or dirty and wet, as others were. Such an order by the defenders to their own agents cannot be binding upon the pursuer without knowledge and assent on his part, elements which are entirely wanting in this case.

"In regard to the second ground relied on by the defenders, the insertion in the receipts of the words, 'weight not guaranteed,' the Sheriff-Substitute is of opinion that the defenders' case derives no support from that plea. The intention of the words obviously is to cover any trifling error that might occur accidentally in ascertaining the weights shown by the steelyard. It would be a strained and unnatural construction of the words if they were to be taken as authorizing the defenders to make a systematic deduction from all goods weighed by them. It may be quite reasonable that the defenders should make some small deduction for 'runnage,' but the amount of deduction would entirely depend on the condition of the potatoes, and in any case notice should be given of the amount deducted at the time. In the present case no notice was given, and the amount deducted being in the Sheriff-Substitute's opinion unreasonable, the pursuer is found entitled to decree. (Intd.) G. R."

"*Edinburgh, 29th October 1883.*—The Sheriff, having heard counsel for the parties on the appeal for the defenders, and considered the record and proof: Allows the pursuer to lead additional proof as to his averments at the end of article 2 of his condescendence, that 'the defenders and their servants have all along been and are both well aware of this custom of trade, and said receipts are granted by them to the public for the purpose of being used, or at least in the knowledge that they are to be used for the purpose of settlement between buyer and seller. The receipts granted

to the pursuer were on this understanding,'—and to the defenders a conjunct probation in reference to these averments: Remits to the Sheriff-Substitute to take the proof now allowed, and to report.

(Signed) "JAS. ARTHUR CRICHTON.

"*Note.*—On reading the proof in this case, it appears to the Sheriff that the parties have not considered it of much importance to adduce evidence in reference to the averments mentioned in the above interlocutor. In one view of the case which was presented to the Sheriff at the debate which took place before him, these averments may be of some importance. He has therefore thought it right to give the parties an opportunity to adduce additional evidence with reference thereto.

(Intld.) "J. A. C."

"*Edinburgh, 19th January 1884.*—The Sheriff, having heard parties' procurators on the additional evidence led for the pursuer and defenders, and resumed consideration of the cause: Recalls the interlocutor of the Sheriff-Substitute of 5th July 1883: Finds in fact, (1) That on various dates between the 21st day of November 1882 and the 18th day of February 1883, the pursuer delivered to the defenders at their station at Kilconquhar 66 tons 10 cwt. 2 qrs. of potatoes, for the purpose of being carried to the persons who had purchased them from the pursuer; (2) That when the said potatoes were delivered to the defenders, their agent at Kilconquhar granted the receipts therefor, Nos. 7 to 19 of Process; (3) That before entering in the said receipts the weight of the potatoes, the station-agent at Kilconquhar, according to instructions received by him, made a deduction from the weight shown by the steelyard of one cwt. per ton for 'runnage'; (4) That according to the said receipts the weight of the potatoes delivered to the defenders between the dates above mentioned is stated to be 63 tons 8 cwt. 2 qrs., being 3 tons 6 cwt. less than the weight as shown by the steelyard; (5) That no intimation was made by the defenders to the pursuer that in the said receipts less weight was stated than the weight shown in the steelyard; (6) That the pursuer was not aware that the receipts had been so made out until March 1883; (7) That the carriage of said potatoes was paid by the purchasers; (8) That the pursuer has been in the practice of settling with the persons who purchased potatoes from him according to the weight shown in the receipts given to him by the defenders' station-agent; (9) That the said receipts were not given by the defenders for the purpose of being used to settle with the buyers the price of the potatoes; (10) That the pursuer has failed to prove that the defenders knew that the said receipts were used by the pursuer for the purpose of settlement between buyer and seller: Finds in these circumstances that the defenders are not liable in payment of the damages concluded for, and assoilzies them from the conclusions of the action, and decerns: Finds the defenders entitled to expenses, of which allows an account to be given in, and remits the same, when lodged, to the auditor to tax and to report.

(Signed) JAS. ARTHUR CRICHTON.

"*Note.*—In this action the pursuer asks for a decree against the defenders of the sum of £13, 6s., being the loss and damage sustained by him 'through the unwarrantable conduct and breach of contract or course of dealing on the part of the defenders.'

"The pursuer sets forth on record that the defenders 'retained or appropriated 3 tons 6 cwt. 2 qrs. of his potatoes.' There has been no attempt to support this by evidence, and it must be assumed that the defenders delivered all the potatoes they received from the pursuer. It is proved that when potatoes are carried by rail there is always, no matter how well dressed they may be, a quantity of earth or sand shaken from them, and that, consequently, they weigh less at the end of the journey than at the commencement. The Railway Company have been in the use to make an allowance for this, which is technically called runnage.

"The pursuer seeks to make the defenders liable for the sum sued for on two grounds—(1) In respect of unwarrantable conduct on their part, which he says amounts to delict in law; and (2) in respect of breach of implied contract.

"The conduct of the defenders, which the pursuer says was unwarrantable, and amounted to delict in law, consisted in their stating in the receipts given for potatoes delivered to them less weight than was shown on their steelyards, without intimating to the pursuer that they had adopted this course in order to allow for 'runnage.' Now, in the first place, there was no express contract between the pursuer and defenders for the carriage of the potatoes. It is admitted that the carriage was paid for by the parties to whom the potatoes were consigned. The natural and primary purpose of the receipts granted by the Railway Company is to acknowledge the amount or weight of the goods received, and to fix the amount they are bound to deliver. These receipts have nothing to do with the amount payable by the buyer to the seller. The defenders are merely carriers entirely unconcerned with the contract of sale. If the pursuer chose to trust the Railway Company with the weighing, and adopts their note of the weight as the basis of his right against the buyer, he does so at his own risk. If the receipts are wrong, the seller takes his chance. He should ascertain for himself the quantity of goods he sells and is entitled to charge for. But it is said that if a person misrepresents a fact on which another acts or is entitled to act, the person making the misrepresentation will be liable for any damage which may have been caused thereby. The Sheriff is unable to adopt this view. In order to create liability for such a misrepresentation, it must be shown that it was made fraudulently. In the present case there is not the slightest evidence of any fraud on the part of the defenders.

"The second ground upon which the defenders are sought to be made liable, is in respect of breach of implied contract. The Sheriff has had some difficulty with regard to this ground of liability, which is rested on the averment that the defenders knew that the receipts were granted for the purpose of being used for settlement between buyer and seller. After the discussion which took place before the Sheriff on 22nd October, he thought it advisable to allow parties to lead additional proof on this point. That proof has now been led, and the Sheriff is of opinion that the pursuer has failed to prove knowledge on the part of the defenders of the custom or practice he avers. Even if he had, it would still be very doubtful whether the knowledge made them liable.

(Intld.) "J. A. C."

SMALL-DEBT COURT OF LANARKSHIRE.

Sheriff LEES.

STEVENSON v. DONALDSON.

Hypothec—Hired Piano.—Held that a piano which was on hire by the month in the house of the pursuer's tenant was not subject to the pursuer's hypothec.

The judgment pronounced was as follows:—The pursuer is owner of a house of which one George M'Lean has been tenant by the year for the last two or three years at a rent of £23. On 14th February 1883, the pursuer took out a summons of sequestration in the Small-Debt Court in security of the rent to become due by M'Lean at Whitsunday 1883, basing his application on the ground that M'Lean was removing his effects. On 15th February the sequestration was executed, and the articles inventoried were appraised at the value of £11, 5s. On this amount £10 were taken as the value of the piano in question. In the course of the same day it was removed by the defender, and the pursuer sues him for the sum of £10 as appraised value of the piano, which he says was illegally removed. The piano was put into the house on 28th December 1882, and was let on hire by the month to Miss M'Lean, the tenant's daughter. Thus the question raised is whether the piano is subject to the pursuer's hypothec? and I have at the request of parties carefully considered the matter, and deferred deciding it till the report has been issued of the case of *Nelmes and Co. v. Ewing*, decided in the Court of Session on 23rd November last. The pursuer's contention is that the piano was part of the *invecta et illata* of the tenant, and having been in the house during the currency of the term for which sequestration has been used, is liable to his hypothec. There is no doubt that this is a view commonly received, but I think it must be received with some caution. The two general principles on which the right claimed by the pursuer arises are these. Firstly, if a tenant does not pay his rent his landlord is entitled to obtain warrant from the Court for the sequestration and sale of the tenant's effects to the amount requisite to pay the rent, interest, and expenses. Secondly, a landlord is entitled to have security for his rent. In small subjects it is common, and properly so, to stipulate that the rent shall be paid in advance. But in any event the landlord is entitled either to have the subjects plenished to an extent sufficient to secure payment of the rent, or to have the tenant ordained to find caution to that extent if they be not so plenished. In both cases, of course, I speak only of the landlord of urban subjects; for the landlord's hypothec in the case of agricultural or pastoral subjects exceeding two acres in extent has been recently abolished by the Legislature. As the plenishing of the house is—so far as the landlord is concerned—only for security, and as he has always a direct right against the tenant personally, it is sufficient for his purpose if there be adequate plenishing in the house. It is not for him to inquire to whom that plenishing belongs; and it would not be workable if the duty were cast on the landlord to satisfy himself that the articles of furniture in his tenant's house were the property of that tenant. Accordingly it has long been settled that, speaking generally, hired furniture is liable to the landlord's hypothec. To some extent, I doubt not, this view arose from the fact

that a century ago it was a common practice for tenants of flats in Edinburgh to hire the furniture of the house from brokers. Now, such brokers knew the risk they ran. They knew the landlord was entitled to insist that his tenant should plenish his house, and that such plenishing was subject to the landlord's hypothec. Therefore, when they supplied the furniture, they were aware of the risk; and they could, by the amount of hire they charged, be their own insurers against the risk of some of the furniture that they had let out being impounded for rent. But it seems to me there is no practical analogy between such a case and the case of a single article being let on hire, especially where that article is one of luxury, and not of necessity. For example, it may be said to be necessary that every tenant should have a kitchen grate; but it can scarcely be said to be necessary that every tenant should have a piano. It is accordingly common for pianos to be hired by the day, by the week, and by the month; and I doubt if the principle for which the pursuer contends were adopted that it would be satisfactorily workable. The piano might be in a dozen different tenants' hands in the course of a year, and is it to be subject to the hypothec of as many landlords? If the landlord of the tenant who had it in April sequesters it, is the landlord of the tenant who had it in March to have the right to sequester it and carry it off from the April tenant's landlord, and so on? With a houseful of furniture, the same thing, of course, cannot be said to be absolutely impossible; but at the same time it is so unlikely as to stand on quite a different footing. It will be noticed that in the case of *Nelmes v. Ewing* the Supreme Court pointed out that there was an obvious distinction between the case of a single article of furniture let for hire for a limited time and for a definite purpose, and the case of the entire plenishing of a house. It appears to me out of the question to say that here the pursuer was trusting for his rent to the security afforded by the piano. The case of *Penson v. Robertson*, 6th June 1820, F.C., may perhaps be referred to as deciding that a musical instrument lent out for hire is subject to the landlord's hypothec. That case may perhaps be accepted as an authority tending in that direction; but the report of the case is so meagre that, without fuller knowledge of its circumstances than I can obtain, I should be reluctant to lay down a principle which does not command my approval as either just or necessary. In support of the view I am taking, I may refer to the case of *Milne v. The Singer Sewing Machine Company* (*Journal of Jurisprudence*, September 1881), in which Sheriff Barclay held a sewing machine lent on the hire-purchase principle was not subject to the landlord's hypothec; and to the case of the same *Company v. William Docherty* (*Journal of Jurisprudence*, August 1882), in which Sheriff Birnie pronounced a similar decision. It seems to me that the present case is a stronger case for the defender than either of these two, because there the article had been in the house a lengthened period, and, being on the hire-purchase system, would have become the tenant's property, and therefore subject to the landlord's hypothec, on payment of the hire for the stipulated period. Here the piano had only been in the house for seven weeks, and had, as matter of fact, been let on hire not to the tenant, but to the tenant's daughter. It is obvious that if the pursuer's contention be sound, and that a piano would in such circumstances be reclaimed by the landlord of a tenant who had had it on

hire during the preceding twelve or fifteen months, then the sale of that piano would be attended with risk, unless the sale were deferred till three months after the term of Whitsunday. And it would be manifestly unjust to the purchaser and prejudicial to the general interests of trade that a *bona fide* purchaser should run the risk of having the piano he had purchased evicted from his possession by one or other of the numerous landlords to whom such a right was open. It seems to me proper also to bear in mind that the tendency of decisions during the last half century has not been to enlarge the scope of a landlord's hypothec, and that its abolition in regard to agricultural subjects by the Legislature may be regarded as a good reason for not stretching the principle further than it has previously been authoritatively extended. And it appears to me reasonable that where, as here, the article in question was admittedly not the tenant's property, the landlord should show cause why an article which did not belong to his tenant should be dealt with as if it did. And that has not been done. It would have been more natural that he should have obtained warrant to bring back and inventory and secure his tenant's furniture than that a person who is not his debtor should be made liable for the tenant's rent. But I decide the case on this broad general principle, that the landlord's hypothec cannot be justly held to embrace a single article of furniture on hire in the tenant's house for a limited short time. I accordingly assoilzie the defender with expenses.

Act. M'Kinnon—Alt. Ritchie.

Notes of English, American, and Colonial Cases.

NEGLIGENCE.—*Supply of defective article—Injury caused to person using it with whom there was no contract—Liability for injury so caused.*—The plaintiff was employed by G., who had contracted with a shipowner to paint a ship which was lying in the dry dock belonging to the defendant. The defendant had contracted with the shipowner to erect staging round the ship, for the purpose of having the ship painted. One of the ropes of the staging was defective, and while the plaintiff was standing on the staging and engaged in painting the ship, that rope broke, and the plaintiff fell into the dock and was injured. In an action against the dock-owner for damages for the injury thus caused,—*Held*, reversing the judgment of the Queen's Bench Division, that the defendant was liable for the injury thus caused to the plaintiff. *Heaven v. Pender* (App.), 52 L. J. Rep. Q. B. D. 702.

SHIP AND SHIPPING.—*Marine insurance—Barratry leading to seizure—Warranty free from seizure—Cause of loss.*—A policy of marine insurance, in the ordinary Lombard Street form, enumerated among the perils insured against "barratry of the master," and contained a warranty "free from capture and seizure and the consequences of any attempts thereat." The ship was seized by Spanish revenue authorities for smuggling (the barratrous act of the master), and considerable sums were spent by the owners in procuring her release. In an action brought against the insurers to recover the sums so spent,—*Held*, that the loss was one occasioned by capture or seizure within the meaning of the warranty, and was not

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THOUGH our predictions as to the conduct of a friend may not be infallible, it is nevertheless plain that they possess a high degree of probability. If we have known him to resist a temptation to falsehood on many occasions, we may reasonably conclude that he will speak the truth in the particular case we are considering. It is possible our confidence may be mistaken, but on the whole our calculation of the result is more likely to be correct if we proceed on the assumption of his honesty. The probability of our accurately foretelling the action of a large number of persons collectively is doubtless not so great, but we are constantly in the habit of making such predictions and regulating our conduct by them, and that with a considerable degree of success. What then is the basis of our calculations? It is this, that all men possess a large number of common attributes, are swayed by similar motives, subject to similar passions,—in a word, have a common human nature; furthermore, that a man's action at any time is the outcome of his character as formed by the influence of education and surroundings in developing or repressing hereditary predispositions, and further modified by special motives.

The insoluble problem of the Freedom of the Will need not here distract us, for its bearing on the question may be thus stated. We are agreed that our predictions of the future conduct of a man can never be absolutely certain; but whereas the school of which Mr. Mill is the most distinguished modern representative asserts that if we had a complete knowledge both of the character of the individual and of the circumstances, we could predict his conduct infallibly, the followers of the other school maintain that even in that case he might fling off the trammels of character and circumstance, and act contrary to our supposition. But no one

denies that on the whole men do act in accordance with their character and surroundings, and this forms a sufficient basis for political science. It is of man as a rational being that we are thus enabled to form predictions; the only men of whom it is impossible to conjecture what their conduct will be, because they act in a purely arbitrary manner, are those whom we regard as insane.

In the case of the combined action of a large number of persons the difficulty is not increased so much as might at first sight appear. The private wishes and inclinations of the individuals who compose the group to a large extent cancel one another, and the action mainly results from the exercise of the common reason which all possess. Hence, paradoxical as it seems, the judgment of a crowd is as a rule fairly correct, though, if we selected from it individuals at random, we should probably find their views prejudiced and onesided. Our knowledge, therefore, of the chief characteristics of human reason, of the motives which most powerfully appeal to it, and of the passions which are apt to prevent its dicta from being fully obeyed, will enable us in many cases to predict the conduct of a mass of people, whose individual characters are entirely unknown to us. All that we claim for a science of politics is that by it propositions may be framed which shall be roughly true.

But, as Mr. Mill convincingly shows, this by no means excludes its right to be admitted among the sciences. At the end of his chapter on Approximate Generalizations he says: "There is a case in which approximate propositions, even without our taking note of the conditions under which they are not true of individual cases, are yet, for the purposes of science, universal ones, viz. in the inquiries which relate to the properties, not of individuals, but of multitudes. The principal of these is the science of politics or of human society. This science is principally concerned with the actions, not of solitary individuals, but of masses; with the fortunes, not of single persons, but of communities. For the statesman, therefore, it is generally enough to know that most persons act or are acted upon in a particular way; since his speculations and his practical arrangements refer almost exclusively to cases in which the whole community, or some large portion of it, is acted upon at once, and in which, therefore, what is done or felt by *most* persons determines the result produced by or upon the body at large. He can get on well enough with approximate generalization on human nature, since what is true approximately of all individuals is true absolutely of all masses." And Mr. Mill stigmatizes as a popular error the belief "that speculations on society and government, as resting on merely probable evidence, must be inferior in certainty and scientific accuracy to the conclusions of what are called the exact sciences, and less to be relied on in practice."

If, then, the possibility of a science of politics be assumed, its

foundations must rest on a knowledge of human nature, and of the laws by which the characters of men are slowly formed and stereotyped.

It is their thorough grasp of this fundamental principle which gives to the political speculations of Plato and Aristotle a permanent value, not merely from the light they throw upon Hellenic thought, but still more, because the methods they employed and the truths they arrived at are as sound for modern England in the nineteenth century as they were for ancient Greece in the fourth century B.C.

When Aristotle lays down the principle that man is by nature a social being, *πολιτικὸν ζῶον*, that the science of politics must not be separated from ethics, that the moral ideal for the state is the same as that for the individual, viewed in another aspect, he is far in advance of the pretentious school of Hobbes and Rousseau with their fine theories of a social contract by which it was agreed that it was not good for man to live alone, and a code of morality was fixed having no higher sanction than that which their new society could impose. When he traces the development of the state, from the family, through the village community, his teaching cannot be better illustrated than by the luminous pages of Sir Henry Maine, who arrives at precisely the same conclusions by the most approved methods of the historical school. When he tells us that the state is not a mere local union to prevent crime and facilitate barter, no mere material institution for the protection of life and property,—though it was to supply these bodily needs that it first arose (*γίγνομαι μὲν οὖν τοῦ ζῆν ἕνεκα, οὕσα δὲ τοῦ εἶ ζῆν*),—but a real moral organization for the development of man's higher self, and that the citizens ought to live not for themselves but for the commonwealth, he offers an ideal for the art of the statesman and the life of the citizen than which none can be nobler. Had statesmen not shut their eyes to ideals like these, and sought after some small thing, such as to raise their country to the first place among the powers of Europe, while private citizens, imitating their betters, made fame or fortune their only end, the hideous spectres of Nihilism and Fenianism might not now be stalking in our midst. Incredible as it would appear to those who regard the study of the ancient languages as chiefly valuable for enabling us to give the etymology of familiar words, and think it of more importance that their sons should know how to speak to a waiter at a Parisian café, or read the *Allgemeine Zeitung*, than acquire a knowledge of a civilisation which has leavened the whole western world, and of the poets, philosophers, and historians whose thoughts have sunk deep into the common consciousness of Europe, and whose works have been the models of style which all succeeding writers have striven to imitate, we believe there could not be a better introduction to the study of law than the thoughtful perusal of Aristotle's Politics.

At any rate we cannot afford to neglect the subjects of which Aristotle treats, and a course of political philosophy would be incomplete indeed which told us nothing of the origin of the state, and the end for which it existed, of the principal forms of government, and the weaknesses inherent in each, of the duty of the state in respect of education, and of the best qualifications for office. We have purposely spoken first of the possibility of a science of politics in a somewhat restricted sense, as indicating our belief that by careful observation of the phenomena of social life, and by tracing the slow growth and development of its institutions, guided throughout by a knowledge of the laws of mind and the formation of character, we may discover some general tendencies, and frame approximate generalizations as to the effects produced by certain causes, which will enable us in a limited degree to predict what will be the results of some measure, for example, a new legislative enactment, and confirm our conviction that "coming events cast their shadows before" for those who have eyes to see them.

The possibility of such a science can only be excluded by the assumption that in human affairs no order is traceable, that they are not caused but only happen, in which case experience would have no lesson to teach us. Such an assumption, however, conflicts with human reason, and leaves us in a world of absolute disorder, a chaos buried in impenetrable darkness through which we can only "feel our way to err."

But many attempts have been made to vindicate the existence of a much wider science, resting on these same foundations but covering the whole field of social relations, to which the science of politics, in the narrower sense, with many others, would have to be subordinated.

The vision of such a science has presented itself at various times and to many minds. It is now generally known by the barbarous name of Sociology, but has also been called the Social Science, the Science of History, Political Science, and Social Physics, to mention only a few of its names. The cardinal notion meant to be conveyed by all these phrases has been thus expressed: "All the phenomena of society, all the events and movements that occur in communities of human beings, take place in accordance with fixed natural laws; every community, however large it may be, however heterogeneous its composition, and however discordant the aims of its members, is yet borne along in a regular inwardly determined path or career; nay, the life of the human race as a whole, all calamities, wars and national vicissitudes included, is but one grand and divinely prearranged evolution, pervaded by a huge intention and leading to a definite result." We have called this a wider science than the science of politics we spoke of, but they are not distinguished except in extent. Sociology attempts to reduce the many laws of politics to one law, to find out the "idea," as the Germans say, of which all human history

is the gradual unfolding and phenomenal representation, to point us with certainty to

“The one far-off divine event, to which the whole creation moves.”

It would be impossible within the limits assigned to us to give any account of the history of this science, from the *Scienza Nuova* of Giovanni Battista Vico, 1668–1744, to the *Synthetic Philosophy* of Mr. Herbert Spencer. Vico's theory of recurring cycles has long been superseded by that which represents society as continually advancing, though with varying velocity, in a straight line. The ultimate problem is then to discover the law of this progress. It has been attempted on the *a priori* method by Fichte, Hegel, and Schlegel, while the other school is represented by M. Comte (by far the most voluminous writer on the subject) and by Mr. Herbert Spencer.

Mr. Mill, following Comte, says the laws of the social science must be arrived at by means of what he styles the “inverse deductive method,” which consists in first generalising from the phenomena of society, and then verifying our generalisations by showing their harmony with the known laws of mind. He regards the advancement of this science, with its branches, as the most important work which will be left for the next two or three generations of European thinkers. If this be so, it will assuredly be no mean task for a faculty of law to put its students in possession of some of the results which have been already gained, and to give them such a training as shall fit them for the investigation of subjects at once so difficult and so important.

We regard it then as established, that if we are to discover the most appropriate method of effecting changes for the better, whether in men or in cities, it must be by patient study of the causes and conditions which have made them what they are at present. In dealing with alien races we must endeavour to understand the political and ethical conceptions which have determined the character of their institutions. No system of government, however good in the abstract, which conflicts with the traditions and ideals of the people upon whom it is imposed, can conduce to their happiness or possess any true stability. Hence, as has been pointed out, the importance which is likely to attach to the study of Ethnology, in order to the statesmanlike conduct of an empire, which, like our own, embraces nations of diverse ethnic affinities. This most interesting science, still only in its infancy, and offering a wide field for an army of trained workers, would naturally be included in that branch of a faculty of law which dealt with political philosophy. Another science which is directly derived from the general science of society, but which has been worked out with far greater completeness, is Political Economy. The assured position which is now occupied by this science, and the acceptance of many of its doctrines as beyond question, is in itself enough to

shake the confidence of those who maintain that there can be no science of phenomena which are determined by human volition. Political Economy is ultimately based on the single principle that men, so far from acting arbitrarily, are in their commercial transactions actuated by but one motive, viz. desire of gain. It is argued that though this is not strictly true, yet this desire is so much the most general and powerful impulse in all such dealings, that we shall obtain the nearest approximation to the truth by treating it as the only one, and afterwards making allowance for the effects of other causes when we are applying the doctrines of the science to particular cases.

Political Economy is already recognised by our universities, and it is only necessary to assign it to its proper place in the faculty which treats of social relations.

But for the facts upon which are based our generalisations as to the laws which govern human affairs, we must have recourse to the pages of history.

This brings us to the second branch of our faculty of law. The study of history in a scientific spirit is in this country only slowly gaining ground, but a brilliant future lies before it. When we have thoroughly disabused our minds of the notion that we ought to clog our memories with minute incidents in the lives of dull kings and frivolous courtiers, the accounts of whose liaisons and intrigues fill such a disproportionate space in the ordinary textbooks, and realized that the progress of civilisation has not been entirely determined by all the battles and bloodshedding with which our taste for horrors was so glutted in our school days, then and not till then can we expect to find much food for thought in the pages of the historian.

If instead of breaking up history into little bits, as if the accession of a new king marked a moral revolution, and seeming to imagine that between ancient and modern history there was a great gulf fixed, we were to try in some feeble way to trace the slow march of events which indicate the rise of man from primitive barbarism to modern civilisation, to show how little by little he has acquired his dominion over the material world, and how religion and literature and art have moulded and refined his higher nature, and so come to feel that

"The thoughts of men are widened
With the process of the suns,"

we might be tempted to think that the time we had been forced to spend on mastering plans of battlefields and "getting up" genealogical tables had been perhaps greater than their importance demanded. To the lawyer what can be more interesting than to mark the slow steps by which the commands of the father in the primitive household, and the isolated judgments or "dooms" put in the mouth of hero-kings, developed into the vast

and complicated legal systems which regulate the society of our own day?

It will be his too to notice how, as house gave way to clan and clan to state, the position of the individual constantly tended to become more self-determined, so that instead of being fixed in a certain limited sphere by the fact of birth, fast bound by the chains of family and class, he is now free to alter his position and to shape his life by his own acts; how, as Sir Henry Maine expresses it, there has been a gradual advance from status to contract as the chief determinant of social relations. Under the guidance of Professor Stubbs at Oxford, and Professor Seeley at Cambridge, the study of history has been placed on a far more satisfactory footing at the English universities than was ever previously the case, and the great number of men who graduate in this subject is sufficient evidence of its attractiveness.

It is very much to be regretted that the University of Edinburgh, which has a much stronger law-faculty than any of her rivals, should be so exceptionally weak in this department. Constitutional history is indeed recognised as forming part of a thorough legal education; but the period of eight weeks which is allotted to it is quite inadequate, while the wide field of universal history is entirely unrepresented in her professoriate.

It now remains to indicate the scope of the third, and more strictly professional branch of a faculty of law, viz. Jurisprudence. As we have already said, the most complete example of this faculty, in the ordinary sense, is that possessed by the University of Edinburgh. To give some idea of its deficiencies, we will compare it with the corresponding faculty at Berlin.

In the first place, two professors at the German university deliver separate and alternative courses intended to serve as a general introduction to the study of law, showing the interdependence of its various branches, and giving, so to speak, the anatomy and physiology of the science.

This preliminary course, known as *Encyclopædie*, gives the student such general ideas of the subjects to be laid before him afterwards in detail as may prevent the confusion and bewilderment usually created by a sudden plunge into the depths of a great and many-sided science, and is very characteristic of German thoroughness and regard for system. In all scientific inquiry, Aristotle tells us we ought first to draw the outline, and afterwards to fill it in, and no more fitting motto for the class-room in which the *Encyclopædia* was delivered could well be found than this often-quoted phrase of his: *δεῖ γὰρ ἰσως ὑποτυπῶσαι πρῶτον, εἰθ' ὕστερον ἀναγράφαι.*

We turn next to Public Law and the Law of Nature and Nations, which fall, strictly speaking, under the jurisdiction of one professor at Edinburgh, though on the recommendation of the Commissioners of 1858, following the advice given in a Report of

the Faculty of Advocates, he is relieved of the duty of expounding the *jus publicum*, and this subject given over to the already overburdened Professor of Constitutional Law and History. But the present occupant of the chair of Public Law, not confining himself to a mere vindication of the law natural, and recognising the importance of some general introduction to the science of jurisprudence being given, has charged himself with this duty, and has thrown his exposition of Natural Law into the form of a philosophical "Encyclopædie" of the whole science. But International Law alone is a subject to which the entire work of a session might profitably be devoted. It is not too much to say that on the spread of its doctrines, and especially on the recognition that the state like the citizen has both "a duty to God" and "a duty to its neighbour," the permanent tranquillity and happiness of Europe will very largely depend.

The path must be cleared by the internationalists if the "federation of the world" is ever to be more than a poet's dream. How do these matters stand at Berlin?

In the first place, they have a chair of Constitutional Law and History (deutsches Reichs und Rechts geschichte), as well as a separate chair of Public Law (deutsches Staatsrecht).

Secondly, the Law of Nature and Nations is divided between the two chairs of Rechtsphilosophie and Völkerrecht. So that our two professors at Edinburgh have to discharge the functions performed by no less than five of their learned colleagues at Berlin, if we count the two courses of "Encyclopædie" as one only.

Nor in regard to the study of Roman Law is the comparison more favourable to us.

Some knowledge of this great subject has always been regarded as indispensable for a scientific understanding of Scots law. But it possesses an intrinsic value for all time, as the best example of a system of jurisprudence in which the principles of philosophy are with rigorous logic applied to concrete cases, which it would be hardly possible to overestimate. Were the connection between the municipal law of Scotland and the civil law of Rome as slight as that which exists between the latter and the law of England, the position of the Professor of Civil Law would be no whit less secure. For many centuries the Civil and Canon Law shared with the scholastic philosophy the almost exclusive attention of the whole learned class of Europe, and a volume might be filled with the mere enumeration of the civilians. No single professor, however learned, can give in the time at his disposal anything like a full account of the Roman Law as it is preserved to us in the *Corpus Juris Civilis*, far less exhibit its historical development from its origin to its codification under Justinian. At Berlin no fewer than four professors treat of different branches of this subject, taking under their special charge the Pandects, the

Institutes, the History of Roman Law, and Roman Family Law respectively, while there is a fifth chair of Roman and Semitic Law.

The names of Savigny, Mommsen, Krueger, and Puchta, with a host of others which will readily suggest themselves, prove how far we are yet behind Germany in this department of legal study. Among the other professorships at Berlin we find one of German Private Law (*deutsches Privatrecht*), one of Criminal Law (*Strafrecht*), one of Legal Procedure, and one of Commercial Law (*Handelsrecht*), against all which we can only set our two chairs of Scots Law and Conveyancing; while they have two chairs of Church Law (*Kirchenrecht*, and Catholic and Protestant Church Law) for which we have no equivalents. The municipal law of a country must be indeed a marvel of clearness and simplicity if it can be expounded by one professor in a six-months' session.

When it is further borne in mind that of our five hundred law students probably less than half attend any classes except those of Scots Law and Conveyancing, it will be sufficiently obvious that our chance of producing a body of scientific jurists able to meet their continental brethren on equal terms is, to say the least, very small.

But it is not only in the number of professors that our provision for legal education is so inadequate. The professorial prelections are in Germany supplemented by a large number of private tutors, recognised by their university, but dependent for their pupils on the reputation they may have acquired by successful teaching, and unsupported by the university endowments. This is not the place, nor does the writer feel competent, to discuss the respective merits of the professorial and tutorial systems considered as independent, but of the advantages of combining both there can, we imagine, be little question. If our law students could be presumed to have mastered the rudiments of their subject by private study, under tutorial direction and advice, before their attendance on the public lectures, the gain to both teachers and taught would be simply enormous. The professor would be free to devote himself to the higher branches of his subject without being discouraged by the thought that most of his hearers were in entire ignorance of its elements. Originality in a lecturer never fails to command attention and respect, but an original treatment of the alphabet is hardly, at this time of day, to be expected, and many a professor has to repress his best thoughts, the fruits of his mature experience, for fear of trenching on the time required for the elementary instruction of his pupils. To compel a man of real learning and ability to keep himself strictly within the limits of a lecture for beginners, is as much a waste of power as it would be to take the opinion of a Queen's counsel on the question whether two witnesses or one are necessary to the validity of a testament. We believe it is owing to the fact of so many of the

best men in our universities devoting the time to instruction of this kind which they might otherwise have spent in carrying forward their own researches, combined with our blind worship of an examination system which reduces education into a mere race for high places and good marks, that such a comparatively small number of Englishmen ever become really eminent for profound learning.

In a faculty of law the number of examinations ought, we think, to be reduced to a minimum. If our faculty could set an example in this respect to the other faculties, and to all the universities where marks are regarded almost as ends in themselves, it would be, we venture to think, to her endless glory. We cannot refrain from quoting some remarks by Professor Seeley in one of the *Essays on a Liberal Education* :—

“Nothing surely is more important at a university than to keep up the dignity of learning. Nothing surely is more indispensable than an intellectual tone, a sense of the value of knowledge, a respect for ideas and for culture, a scholarly and scientific enthusiasm, or what Wordsworth calls a strong book-mindedness. Now the spirit of competition when too far indulged is distinctly antagonistic to all this. In the case of boys I suppose it must be called in, because boys have not yet felt the higher motive to study. But it vulgarizes a mind capable of this higher motive to apply to it the lower motive in overwhelming force. Students at the university are no longer boys. They differ from boys principally in this, that they are old enough to form an opinion of the value of their studies. And that they should form such an opinion is most desirable, it is in fact one of the principal things they have to do. The student should be always considering what subjects it is most important for him to study, what knowledge and acquirements his after-life is likely to demand, what his own intellectual powers and defects are, and in what way he may best develop the one and correct the other. His mind should be intent upon his future life, his ambitions should anticipate his mature manhood. Now in this matter the business of the university is by a quiet guidance to give these ambitions a liberal and elevated turn. All the influences of the place and of the teachers should lead the student to form a high conception of success in life. They should accustom him to despise mere getting on and surpassing rivals in comparison with internal progress in enlightenment, and they should teach him to look farther forward than he might of himself be disposed to do, and to desire slow and permanent results rather than immediate and glittering ones. Now I say that intense competition vulgarizes, because instead of having this tendency it has a tendency precisely contrary. Instead of enlarging the range of the student’s anticipations it narrows them. It makes him careless of his future life, regardless of his higher interests, and concentrates all his thoughts upon the paltry

examination upon which perhaps a fellowship depends or success in some profession is supposed to depend." We can wish nothing better for a faculty of law than that both its teachers and its students should be animated by the spirit of these words. We cannot do away with examinations for degrees, or as tests of a man's qualification for the practice of a profession, but a university ought to be a good deal more than a mere intellectual wrestling-ground.

We believe, then, that a faculty of law cannot be considered complete unless it embraces the three branches of study which we have enumerated, viz. Politics, History, and Jurisprudence. Of the number and distribution of the chairs in such a faculty we have not thought it necessary to speak. But it will be evident that, in the time usually devoted to a university course, no student could obtain a "smattering" far less a sound knowledge of all these subjects. A large discretion in their choice would have to be given, and probably few candidates for degrees would attempt more than three or four subjects selected from the divisions of Politics and History, together with some branch of Jurisprudence, or a man might confine his reading to one or other of the three divisions.

Compulsory attendance in any class is always if possible to be avoided, and the best that a university can do for its students is to afford them every facility for the prosecution of the particular study for which natural gifts and previous education have best fitted them. Men are not made in one mould, and to regard all minds alike as mere receptacles into which a certain number of facts, and those the same facts, can be put, is to miss the first principle of education. Plato beautifully says the "eye of the soul" is not a blind eye into which knowledge can be poured; it can only be turned to the light.

We honestly believe that if examinations were thrust as far as possible into the background, a crowd of evils would tend to disappear. We should have less teaching of a kind obviously adapted to suit the purpose of an examination. Instead of loading the minds of their students with a mass of facts utterly impossible to retain in the memory except for a week or two, we should have a more constant appeal to first principles. The lecturer who prefers never stating a rule of law without attempting to give a reason for it, to enunciating the complicated provisions of an Act of Parliament, is to our mind a good teacher.

His students will remember the reason without effort, while the details of the Act which they have "got up" so carefully for one examination will be almost forgotten before the next one comes round. The professor who makes frequent comparisons between the laws which he is expounding and similar laws in other municipal systems, with the view of showing the ultimate dependence of all legislation upon the same principles of human nature,

is really training the reasoning faculties and enlarging the minds of his pupils far more than if he made them learn the statute-book by heart.

We have insisted throughout on our faculty being academical rather than professional. Its aim should be to produce not keen lawyers or clever pleaders, but accomplished and scientific jurists.

We are afraid, to the popular consciousness at any rate, the legal practitioner is presented rather as

"a dab at the laws, a splitter of straws,
making black seem white so cunning,"

than as the priest of justice "*licito ab illicito discernens*," which Ulpian says he ought to be. To make the latter representation of him the true one, is the chief function of a Faculty of Law.

F. P. WALTON.

THE "ORDINARY MACERS" OF THE COURT OF SESSION.

It is often a task of difficulty to attempt to trace back the history of an office which has existed for several centuries, because, from circumstances surrounding it, frequently the duties and the position of its holders undergo changes altogether revolutionary in their character. With the macerships in the Court of Session this is especially true, for although the foundation of the Court itself nominally begins the history of the office, yet, on careful inquiry, there will be found distinct indications that some such officer also existed prior to that date. We do not, of course, allude to the Falkland or hereditary macership, which is in an entirely different category, but an examination of the Acts of the Parliaments of Scotland reveals the fact that in 1526, several years before the Court of Session was established by King James the Fifth, we have the ratification of an ordinance by Lyon King-of-Arms, John Scrymgeour and others, regulating the office of macer by command of that monarch; and again, in the same year, James Johnstone, at Edinburgh, asks instruments that "the King's grace admitted him to his office of maissery as he was before." Now it needs no very great stretch of imagination to connect this John Scrymgeour mentioned in 1526 with that Scrymgeour in whose favour the heritable office of macer and sergeant-of-arms had been created in the previous century; and if this much be conceded, it is probable that, along with the chief heraldic authority, the hereditary macer might reasonably be consulted as a high officer for regulating the duties of a subordinate set of persons, akin, perhaps, in the Scottish Parliament, to the macer of Court as he subsequently became.

On the 17th of May 1532 the Parliament of Scotland passed an Act for the establishment of what is now known as the Court

of Session; and, with commendable alacrity, ten days later the Court met for the first time, and, under the powers statutorily conferred, the king gave "command to the Chancelar, President, and Lordis of the Sessioun, to avise, counsell, and conclude upon sic rewlia, statutis, and ordinancis as sall be thoct be thame expedient to be observit and kept in thair maner and ordour of proceeding at all tymes." Out of this direction sprang the long list of the Acts of Sederunt, dating from the first sitting of the Court down to the present session. Amongst the list of officers then appointed, we find the following: "*Item*,—That all massaris be suorne to excerciss thair office faithfullie and diligentlie; and thay sall reveil nathing that thai sal happin to heir comonit amangis the Lordis, under the pane of deprivation and infamite. *Item*,—That na massar tak mair fra ony partie that happinnis to optene ane decreet in Sessioun bot ij ss. (twopence sterling), bot gif it be the parteis awin benevolence, onder the pane aforesaid." This last reference may be to the fact that causes were then advised with shut doors. Here, then, we have the first nomination of the ordinary macers of the Court of Session, an office coeval with the existence of the judicial body it was created to serve. It seems that when the Court was established by King James V., there were appointed four ordinary macers, for although nothing is recorded at that date upon the subject of the number of the macers, we find an Act of Sederunt in 1596 proceeding upon a petition by four "ordinar maissers," a number that seems to have been recognised at the time as the fixed one. Although these gentlemen had enjoyed an official existence of little more than fifty years, they evidently possessed a keen appreciation of the pecuniary emoluments of their place, with considerable influence in defending what they considered their special privileges. We gather that, subsequent to 1532, at a date of which no record exists, there may perhaps have been a now-lost Act of Sederunt, "an auld Act and Statute made by your Lordships," as it is called by the petitioners in 1596, providing that the execution of bills, warrants, and charges proceeding from the Court of Session, but without passing the Signet, should be entrusted to one of the macers, if such execution were to be within the burgh of Edinburgh, or a radius of two miles therefrom. The Writers to the Signet had, it seems, been disregarding this rule, and employed officers-of-arms, which the macers state has not only been very hurtful and prejudicial to the lieges, by creating doubts and questions as to the validity of the acts of these officers, but (tenderest point of all) has been hurtful "to our particular interest and privilege of the libertie of our office, expres agains the auld laws and custumes observit befor your Lordships sen the erectioun of the College of Justice." The application was successful, the monopoly was confirmed, and the deliverance duly followed, "*Fiat ut petatur*."

We now enter upon the 17th century in pursuit of our inquiry;

and find not a few references to the office and its duties in the various proceedings recorded.

The parliamentary proceedings appended to the Acts of Parliament show that on 19th August 1641, the "maissers of Counsaile and Sessione" complained that they were excluded from the Parliament of Scotland by the Earl Marischal, the high official who presumably at that time regulated such matters. This exclusion they alleged was a contravention of their rights. Earl Marischal having been called upon to give in a reply, did so upon the following day. The answer was read in Parliament, and along with it were produced, as an authority on his behalf, two Acts of Council. Again, however, the macers entered their protest at the treatment they had received, and so far they succeeded in making something of a compromise, for on 3rd September 1641, *Rege presente*, as we read, an Act was passed by which (after reciting that the "mutual supplicationes" of the parties had been considered anent the "libertie of staying within ye House of Parliat"), it was ordained that the macers should remain without the doors and there attend until called in to receive directions. The Earl Marischal alone was to have a servant within the house, who was charged with the duty of summoning the macers from without when they were required; but, on the other hand, the macers retained the privilege of being the sole persons authorized to attend on all Committees of Parliament. On 11th November 1641, under a protest by the Earl, we find "this is rejected," so the rule thus laid down became the regulation of the privileges of the office so far at least as related to its parliamentary character.

It will be observed that little more than 100 years after the establishment of the Court of Session, the macers seem to have lost to a considerable degree their connection with the higher Court of Parliament, and to have been more and more recognised as officers belonging to the judicial branch of the executive. No doubt the action of the Earl Marischal was in the interest of his own "servants," whose emoluments would be materially increased by the exclusion of the macers; but the latter so far vindicated their position as to secure apparently the right of fulfilling all "outside" orders of Parliament, much more numerous then than now, as well as the attendance upon Committees, and, as we shall see, upon the Privy Council. No opportunity, however, was lost by the macers of magnifying the labour and the importance of their office, so it cannot create surprise that in 1644 they are found petitioning as the "maisserses of ye Privie Counsell and Sessione" to award them payment out of the fines imposed by Parliament for their "extraordinarie paines and travell in attending" the high Court of Parliament and Committees. They dwell upon these expenses particularly, because at the time it is explained there were "no other judicatories" for them to attend. It would also seem probable that many of these macers were not resident

continuously in Edinburgh, but came there from time to time as their duties called them. The application was successful, as a favourable recommendation of the case was given to the Standing Committee in Edinburgh, and subsequently, in 1646, the macers made an application for payment of the fees or allowances granted to them.

In 1649 there occurs one of those quaint entries, which, among the older Acts of Parliament, serve to throw light upon the manners of the day, and the rough and ready way in which solemn state business was conducted. A certain macer, called John Douglas, was commanded by the Estates of Parliament to "put on ane of ye herauld's coats and to goe to ye croce of Edinburgh with ye heraulds that were present, some of them being out of toune, for proclaiming of King Charles ye Second King of Great Britane, France, and Ireland." That dignitary presumably thought this was too much to expect from a man of his position, and answered the command by desiring that some of the macers of Session might be appointed, and "immediately withdrew from the Parliament." "The High Court," however, was not to be thus treated with impunity, and they proceeded to appoint "John Campbell, servitor to the Lord Chancellor, to put on ye said coat." This he incontinently did, with the result that John Douglas was deposed for his disobedience, and John Campbell for his subservience reigned in his stead, and, best of all, was declared to have right to the full enjoyment of "all dignities, fies, casualities, liberties, priviledges, immunities, commodities, emoluments, profits, and dewties pertayning to ye said office of measserie."

On 15th March 1649, John Douglas humbly petitioned to be restored, having apparently thought better of his dignity when it was forced into strong relief by the absence of wherewithal to maintain it. His petition is curious and interesting, as it shows how strong at this time was the tendency to heredity in such offices. John says the office was granted to him by "the King's Majestie that reigned last," a euphemism for Charles I.; and he adds that it had been held by his father and grandfather "be the space of sex score years without interruption." He dwells upon a record of fifteen years' service, and upon actual personal service in the field with the forces employed by the Parliament. He speaks of the "unspeikable grieff" at the offence taken, and vows that he was free of any thought of disobedience, but merely went to his lodging to fetch his mace. Whatever grounds for leniency the early part of his petition may have furnished, there is much reason to fear that the poor man's "grieff" had obscured his recollection, for his last excuse is palpably absurd, seeing that he was ordered to act as a "herauld" at the proclamation, and forthwith to don the heraldic garb, in which his mace would have been ridiculously out of place. History tells us not the fate of the petition, beyond the fact that it was remitted

to the Committee of Estates, with power to deal with the matter, and we have not been able to find the name of Douglas among the macers incidentally mentioned in the Acts of Sederunt. The family, however, it is clear, must have enjoyed the possession of the office from somewhere about the date of the foundation of the Court down to 1649. Another point crops up in connection with this tale of the haughty macer, and that is the distinction he appears to draw between himself, a macer of Parliament, and those he is pleased to term macers of Session. Evidently this personage, filled with the conscious majesty of a macerial pedigree stretching back upwards of a century, looked down upon these other persons who merely served in the Law Courts,—nay, looked down upon the heralds themselves, as people whose coats might fitly be worn by a class of beings, macers indeed, but not such as he. We have seen Earl Marischal driving the macers of Council and Session from the actual House into the precincts of Parliament only eight years before, and the references in this narrative point to there having already grown up a distinction between the two classes, so that perchance it may be that from this time we may date a separation more or less precise—to which allusion will again be made—between those macers who attended the Law Courts and those whose duties were directly connected with the Scottish Parliament, and who may have been the Earl's nominees.

In the very year of the Douglas fiasco, Alexander Forrest, who is described as one of the ordinary macers before the Lords of Council and Session, was appointed by the Committee of Estates to attend upon them. This shows that while probably the two classes of macers were really the same, certain individuals among them (possibly extra to the number of "four ordinary macers") were from time to time detailed for the special duty of attending these Committees of Parliament. This opinion is confirmed by what is further stated as to Forrest, namely, that Parliament recommended an allowance of three shillings a-day, besides fees, referring this financial matter to the Committee "appoynted for moneyis and accomptis of the kingdome." They also nominated him an ordinary macer to the Committee of Estates and Convention of Estates during his lifetime, or the continuance of the Committee and Convention. That some such difference in the office existed, dependent upon where it was exercised, is still further illustrated by the fact that in 1650 we find the "macers of Parliament" protesting against the ratification of the Lord Lyon's gift, whilst in the same year an Act was passed in favour of "the four ordinary macers of Parliament and Session." Eleven years later, there was passed an Act to allow £25 to the "advocats' servants, and allowances to the macers and trumpeters." Again, in 1662, it is laid down that the Rules of the House of Parliament are to be enforced by the Knight Marischal and the macers, who are directed further to exact fines for disobedience. Thus it is evi-

dent that the Knight Marischal, whose duties may have corresponded in some measure with those of the mordern "Black Rod" in the House of Lords, had some control over these "macers of Parliament."

In 1662 the Court interposed for the remedy of various abuses which had grown up in the Outer House, after a remit, apparently to a sort of joint committee of macers and advocates, who, along with the Keeper of the Minute Book, conferred upon the knotty questions that had arisen. Probably in these days we might doubt whether any reference to a body composed in this way would prove successful, even if the Keeper of the Minute Book were made convener, but two hundred years ago what are now incongruities were not so, and sensible suggestions for the better regulation of the Courts followed. From the date of the promulgation of the new law, the macers were specially directed to refuse access within the "inner bar of the Outer House, where the advocats abide," to all persons save "expectants" and those specially privileged by the Court. If, however, any person were found so foolish or so daring as to neglect or to despise the ordinance, then "the collector for the advocats, with concurrence of the macers," was empowered to exact from the delinquent twenty-four shillings Scots, to be put into the advocates' box for the poor. A similar penalty was to be exacted by the macers for any persons found trespassing within the innermost bar "where the ordinary Lords and clerks do abide, except the Keeper of the Minute Book, the King's Solicitor, and one servant appointed by His Majesty's Advocat." Perhaps it is not necessary to remind our readers that the office of collector for the advocates here alluded to is no longer in existence, and that the gentleman who used, with the macers' august sanction, to drop these Scots shillings into the Faculty poor box, had no connection whatever with the present office of Collector of the Widows' Fund, though he too equally is supposed to collect for the poor!

There are also regulations made against negligent macers, and then follow very particular notices of the "wonted dues" to which these officials were entitled upon certain occasions, and apparently new fees are created for their benefit upon the issue of a commission to take depositions, and upon taking out any bill for commission for service of heirs. These bills seem, prior to this, to have been directed only to the macers, so that probably, as they were in future to be directed to "Sheriffs and others," the fee was in the nature of a compensation. A door, however, was left open for the revival of the older custom, as we shall presently see. A tendency to practise extortion seems to have early developed among macers of that day, for there is, in conclusion, a warning that if they exact more than their "wonted dues," the penalty, where the offence is proved, will be removal from office, with such fine in addition as the Lords think fit.

Only three years had passed when it became again necessary to check the "great confusion and disorder occasioned by the thronging in of people of all sorts" within the bars of the Inner and Outer Houses, and accordingly, in 1665, the macers received stringent orders, on pain of dismissal, to remove forthwith to prison any person found within the bars without right to be there. Can it be that some "*cause celebre*" agitated the public mind and excited universal interest at this time? Can it be that, moved by blandishments or other yet more cogent arguments, the macers had forgotten the ordinances so recently made, and suffered those who had no business to cross the threshold of the judicial sanctum? History does not reply to our questions; but it is difficult to imagine that no such solution is to be found, when we remember how the posse of macerdom so shortly before was in arms to maintain its official privileges. In a few years more the advocates' servants, as they are called, had become a nuisance, from their number apparently, and in 1671 steps were taken to remedy this abuse, and fines of three pounds Scots were to be imposed, thereof the macers and the poor were each to have one moiety; but a threat of imprisonment for neglect of duty was now added to the terrors already hung over this office by the Court; whilst again in 1686 the macers were warned that they must keep the bar properly cleared, "as they will be answerable on their perrill," perhaps on the principle of *omne ignotum pro magnifico* as applied to the punishment.

An Act of Parliament was passed in 1686 in favour of the "sex macers of Parliament," who seem there to be distinguished entirely from the Court of Session officials, at least in designation, though possibly they were all or at least some of them the same individuals. The circumstances which called for legislation arose out of an encroachment on the part of the Lord Register's servant, who had assailed the privileges of the powerful Guild of Macers, by giving out ratifications to the parties in whose favour they had been granted, without the macers having had proper opportunity for securing the "sومة of six shillings starling," their usual due "past memory." The macers were too many for the offender, as they had been in many a prior fight for their rights and privileges, and the Act of 1686 stands a record of their victory.

By Act of Sederunt, passed on 23rd February 1687, the macers are expressly included amongst the persons declared to be members of the College of Justice, being there designated as "the macers of the Session." This was a matter of some moment at that time to those concerned, because it conferred an immunity from payment of the annuity for the ministers' stipends, and from customs and dues upon goods and provisions carried to and from the town or any place within its liberties. All persons included in the list there given were also exempt from the civil jurisdiction of

the magistrates of Edinburgh, but as regards the criminal jurisdiction "the Lords declare they will take tryall what has been the former custome." In June of the same year, the nervousness of the macers about their fees appears again to have been aroused, and authority was obtained to ensure that, whoever uplifted the dues of Clerks of Session, should at the same time collect the sums payable to the macers.

In 1690 the Court seem once more to have been afflicted by the crowds who frequented the Parliament House, and though the inefficiency of a fine had by this time been tolerably well proved, they nevertheless imposed one of half a dollar, to be exacted by a macer, who was himself to be mulcted if he should "spare any person in not exacting the said fine." Passing over another reference to the collection of their fees in 1690, we come to the last mention of the macers which is recorded in the Acts of Sederunt during the 17th century. It is dated 11th November 1691, and serves well to illustrate the curious state in which things legal then were. Warrants were, it seems, at that date commonly granted upon the complaint of persons whose processes were being kept up by "advocates or their servants." These warrants were to the macers for apprehension of the delinquents; and the advocate or his servant, as the case might be, was, we learn, in the habit of maintaining that he was not liable in payment of fees to the macer "for his pains in apprehending" him if he produced the missing process. The macers, however, stoutly maintained their pecuniary claims, and the Lords cut the gordian knot, by a decision that, although the complainer was not liable, the macer on his part could keep his man in custody "untill he not only reproduce the process, but also satisfie him (the macer) for his pains in executing the Lords' order." Presumably, rather than suffer durance vile at the hands of this chosen emissary, the advocate of the day paid up thereafter for himself, and found his servants in funds to do likewise.

The lines of distinction between macers' duties in Courts of Law, and their employment in Parliament, were evidently diverging considerably towards the end of the century, for both in 1696 and in 1698 there occur in the records of Parliament recommendations that a gratuity should be allowed to the macers and the Keeper of the Parliament House for their extraordinary attendance in the legislative chamber, and this of course points to the special nature of such duties when assigned to these officers.

With the Act of 1698 we shall close our review of the history of the macers before the Union, reserving for another occasion the concluding portion of the story down to recent times. In the year referred to, the four ordinary macers petitioned Parliament, setting forth the undoubted fact that they were part of the original constitution of the Court, and modestly adding that, although "they are not in that eminency or order as severall others,"

yet their service was most laborious, and "there are fewer of their station seen to arrive to the age of old men than any of the rest that compose that Honourable Society." They pointed out that they were not paid well enough, for whereas the "macers of Council" had £50 per annum, they only received £10, and besides by recent legislation had lost much of their fees. It may be doubted whether the argument founded upon absence of longevity would have much weight now-a-days in such an application, but it appears to have had its effect in 1698, and Parliament granted the request, assigning to these macers a fee of twelve shillings Scots upon each first extracted Act.

(To be continued.)

DECISIONS UNDER THE EMPLOYERS' LIABILITY ACT.

(Continued from p. 258.)

The relation affected by the Act.—Prior to the passing of the Employers' Liability Act, the principle of collaborateur, or the principle of which it is an exemplification, and for which the "doctrine of collaborateur" is a convenient brief expression, was applied by the Court of Session in a case where the man injured and the person whose negligence caused the injury were not in the exact sense of the term fellow workmen, or at least fellow servants, not being servants of the same master; *Woodhead v. Gartness Coal Co.*, 10th February 1877, 4 R. 469. In this case, a miner in the employment of contractors for driving a level in a mine belonging to a company, whose manager and underground manager were in charge of the mine, was killed owing to the negligence of the underground manager. The company was held not responsible. The principle of the decision was thus stated by the Lord President: "As the result of the whole authorities, it appears to me that one of the conditions subject to which every man must become a member of one of these organizations of labour, is that he shall take on himself all the perils naturally incident to the work he undertakes, without looking to any one else to guarantee him against or indemnify him for injuries sustained from the occurrence of such perils. . . . If two miners are employed and paid by the same master," and while they are working together, one is injured by the negligence of the other, "the master is not answerable, because it is said they are engaged in a common employment, that is to say, *they are engaged in the same work as servants of the same master*. But if the legal principle was applicable to this case only, it would cease to be a principle and degenerate into a mere arbitrary and artificial rule." The Employers' Liability Act was clearly intended to meet such a

case as the above. But as soon as the Act was passed a doubt was started whether it did meet it; whether, although intended in the case of persons engaged in manual labour to remove the defence arising in cases of the relation of which the case of fellow servants is an illustration, the terms of the Act only applied to cases of the relation of fellow servants pure and simple,—in short, to cases of the illustration merely, not to cases of the principle extending beyond the illustration. The Act says: "The workman . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work." The question has been decided in the case of *Morrison v. Baird*, December 2, 1882, 10 R. 271. The decision is that the Act does apply although the person injured and the person whose negligence caused the injury are not strictly speaking fellow servants. The Act may have, as we do when we speak of the doctrine of collaborateur, expressed itself in popular terms; but the relation, the liabilities arising in connection with which it was desired to alter, is the relation which the Act does affect. In this case, a workman in the service of a sub-contractor to the contractors, the tenants of a quarry, was while working at the quarry killed through the negligence of the tenant's manager. The case of *Woodhead* here excluded liability at common law of the tenants, the common employer, the injuries being caused by the fault of persons who along with the person injured formed part of the organization of the quarry; but the Court held the case was covered by the Act. As the decision is of importance beyond the point immediately decided, important as this is, involving as it does the mode of construction to be applied to the statute generally, we quote from the opinion of Lord Young somewhat at length. "It was argued that there is no case within the statute, that is, taking the pursuer's statement of the facts that the deceased was working in the employment of a man who was a servant of the defenders, then it is clear that the relation of collaborateur in the ordinary sense did not subsist between the deceased and the defender, manager, or other servant to whose negligence the accident is on the statement attributed. But then the case of *Woodhead* determines that for the purposes of the doctrine in question, the relation of collaborateur does subsist in these circumstances. I own that is a nice question, and in the case of *Woodhead* there was a difference of opinion upon it. . . . The Court in the result determined by a majority that the relation did subsist in these circumstances, that for the purposes of the rule of law in question the party suffering and the party through whose negligence that suffering was occasioned were fellow servants of the same common employer, and that the common employer was therefore not liable. Then comes the remedial Act,—for it is notably a remedial statute,—a statute to remedy that rule of the

common law in certain specified cases in which it appeared to the Legislature to operate hardship. Well, it is a familiar rule in the interpretation of statutes that you shall interpret them with reference to the mischief to be remedied, that unless there be an impossibility you shall make the remedy co-extensive with the mischief which it appears plain from the language of the statute that it was the purpose of the statute to remedy. Now, this case is certainly within the rule referred to. That the statute was intended to provide a remedy for the mischief of which the case of *Woodhead* was an example—that is, that the hard operation of the common law, in certain specified cases where the relation of collaborateur exists—is beyond all question. But then it is said the statute must fail in its end in this particular case, because the doctrine in the case of *Woodhead* is applicable to the common law, and therefore, although efficacious to extend the mischief, is not to be taken as establishing what shall constitute the relation of collaborateur so as to bring the case within the remedy of the remedial Act. I cannot assent to that. I think it is against the established rule of interpreting remedial statutes liberally according to the plain intention of the Legislature—interpreting them so as to meet the mischief and the whole mischief which it appears to be the intention of the Legislature to remedy. Nor do I find it necessary to strain anything in order to reach that conclusion, for every statute must be interpreted with reference to the rules of the common law. What shall constitute the relation of collaborateur with reference to the question of a master's liability, is a question of common law, upon which, as the case of *Woodhead* shows, there may be a nice and subtle argument and a difference of opinion in the result. That and similar rules of the common law cannot be embodied in every statute which provides for the case where such relation exists. You must read the statute with reference to the rules of the common law in this and an infinite variety of other particulars. . . . Here I read these provisions with reference to the common law as established by the case of *Woodhead*. Therefore, upon the pursuer's statement, I should hold that the relation contemplated by the Act subsisted between the deceased and the person through whose negligence the accident arose."

To whom the Act applies.—"Employers' Liability Act" is only the short title, and in one respect is a misleading title of the Act. "Employers of Workmen Liability Act" would be a more correct description. The protection of the Act does not extend to all persons employed, but, as the first section states, only to workmen. Consequently, in the case of an employee who is not a workman, *i.e.* a person who, unless, indeed, he be a railway servant, is engaged in manual labour, the old principle of *collaborateur* still applies. No ground in reason or equity can be assigned for thus limiting the operation of the Act. If the committal of superintendence is to

make an employer liable for the negligence of his superintendent in the case of a workman, a person engaged in manual labour, why should it not in the case of any other class of persons employed? To take an illustration from the recent case of *Morgan v. London General Omnibus Company*, when the driver and the conductor of a tramway car are both injured in an accident arising from the negligence of a superintendent or a defect in the condition of the plant, why should the driver have a remedy against the employer and the conductor not? The lop-sided character of the Act is still further apparent when we consider that to this arbitrary limitation there is an equally arbitrary exception so far as regards railway servants. A railway servant, and he alone of all employees, does not require to be engaged in manual labour in order to obtain the benefit of the Act. Why should a ticket collector at a railway station be entitled to the benefits of the Act, and the ticket collector at a theatre, or, a still more cogent illustration, the ticket or fare collector of a tramway car, not be entitled? Railway servants, it may be remarked, are favoured in two ways—(1) they have the benefits of the Act although not engaged in manual labour, and (2) the grounds of liability are more extensive in their case than in the case of other employees. The practical reason why the operation of the Act has been limited to the case of workmen, and an exception made to the limitation in the case of railway servants, was that these classes were powerful enough, active enough, and sufficiently banded together to get the law altered in their favour, while other classes of workmen were not.

Who is a workman in the sense of the Act?—The Act does not give a definition of its own; it gives one of those referential definitions which are common in Acts of Parliament, which are put in to avoid repetition, we presume, and which cause confusion, and certainly trouble, in reference. Section 8 says: "The expression 'workman' means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies." The Act to which reference is made is one with regard to the settlement of disputes between employers and workmen. The first question which arises as to section 10 is this—In determining whether a person is a workman for the purposes of the Employers' Liability Act, is that Act, its scope, its purpose, and its other provisions to be looked at, or is the Act of 1875 alone to be regarded? There is only one case in which opinions have been expressed on this point, *Morgan v. London General Omnibus Company*, L. R. 12 Q. B. D. 201; and the two judges in that case at first expressed opposite opinions, but a coincidence of opinion was ultimately obtained by one of the judges expressing an opinion opposite to the one he had first expressed. It was there held that an omnibus conductor was not a workman in the sense of the Employers' Liability Act, and therefore not entitled to claim under that Act. Mr. Justice Day said: "The question must be determined upon the construc-

tion of section 10 of the Employers and Workmen Act, 1875 . . . I unhesitatingly come to the conclusion that this omnibus conductor is not a labourer within section 10 of the Act of 1875, and I arrive at this conclusion without any reference to the Employers' Liability Act, 1880. I protest against the argument of Sir Hardinge Giffard as to that. I can understand that an earlier statute may be referred to for the purpose of throwing light upon the construction of a provision in a subsequent statute; but I cannot follow his reasoning as to construing the language of an earlier statute by that of a subsequent Act. The meaning of section 10 of the Act of 1875 is to be determined by the words used in that section. The 8th section of the Act of 1880 cannot be looked at to explain what the Legislature meant in 1875." Mr. Justice A. L. Smith, on the other hand, said: "The only point upon which I incline to differ from my brother Day is, that in considering who is a 'workman,' we must ignore the Act of 1880. To that proposition I cannot assent." Mr. Justice Day afterwards added: "I desire to withdraw an expression of opinion that the Employers' Liability Act, 1880, is not to be taken into consideration in determining the meaning of the words used in section 10 of the Employers and Workmen Act, 1875. Regard must be had to both of these Acts." Second thoughts are not always best, and we think the first opinion of Mr. Justice Day is clearly the right one. If in the Employers' Liability Act it had been said that "the definition of 'workman' in the Employers and Workmen Act, 1875, is *incorporated herewith*," the case would have been quite different. But it is not this which is said; it is that the expression shall mean any person to whom the Act of 1875 *applies*. In construing the terms of an Act of Parliament, it is legitimate, usual, and proper to consider the scope and object of the Act, and to take into account the inference to be drawn from other provisions of the Act than the definition clause. The same term might therefore have a different meaning in different Acts, the scope and object of which were different. The scope and object of these two Acts are different, the one relating to compensation for injuries, the other to the settlement of disputes. If, in determining who is a workman under the Act of 1880, you take *its* provisions into account, you might come to the result that some person was *not* meant by the term "workman" when used in it to whom the Employers and Workmen Act, considering *its* scope and object, applies, and this is just the opposite of what is said by the 8th section of the Employers' Liability Act, viz. that it means any person to whom the Act of 1875 applies.

In section 10 of the Employers and Workmen Act, the expression "workman" is defined. It "does not include a domestic or menial servant," but saving this it "means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, . . .

has entered into or works under a contract with an employer." To be engaged in manual labour is the essence of the definition. Is a tramway or omnibus conductor a workman in this sense, is a question which has been decided in different ways in Scotland and England. In *Wilson v. Glasgow Tramways Co.*, June 22, 1878, 5 R. 981, opinions were given by Lord Justice-Clerk Moncreiff and Lord Ormisdale, that such a person is a workman in the sense of the Act. "There is a considerable want of precision in both these clauses [section 10, and section 3, sub-section 2 of the Employers and Workmen Act]. But I am of opinion that the respondent was a workman in the sense of the statute. He was not a domestic servant. He was not other than a labourer employed to attend on the tramway cars, as much so as a miner employed to work a windlass or the gearing of a pit, or a man engaged to guide the horses of a track-boat on a canal. I am unable to draw any distinction which would not neutralize the Act altogether." Lord Ormisdale said: "I can entertain little doubt that the pursuer is comprehended by the clause. He may not belong to any of the classes specially enumerated, but I can see no sufficient reason for holding that he does not fall under the general description of persons being servants engaged in manual labour; and I feel myself confirmed in this view by the circumstance that domestic or menial servants are expressly saved or excluded from the operation of the Act, the inference being thereby rendered irresistible, as it appears to me that all other servants engaged in manual labour are comprehended. And it cannot be disputed that the pursuer, being occupied or employed as a guard to an omnibus or tramway car, is acting as a servant engaged in manual labour." Lord Gifford, the other judge in this case, taking a view of the case "which superseded the questions raised upon the construction of the Workmen Acts," refrained from expressing an opinion, except to say that this was a "difficult question of law." In *Morgan v. General Omnibus Co.*, *supra*, the Queen's Bench Division took an opposite view from the Court of Session. Mr. Justice Day said: "I unhesitatingly come to the conclusion that this omnibus conductor is not a 'labourer' within section 10 of the Act of 1875." After an enumeration of the various terms in the section, the learned judge continued: "Is this man a labourer? In one sense every man who works or labours may be called a labourer; but it cannot be said that he is therefore within the statutory definition of a 'workman.' Then is this person a journeyman? Etymologically considered, a journeyman is one who is employed by the day; but that is not the sense in which the term is ordinarily used, for in most trades where journeymen are employed,—butchers, bakers, and tailors, for instance,—they are hired and paid by the week. In common parlance, no one would call an omnibus conductor a journeyman. Neither is he an artificer or handicraftsman. And the general words, 'or otherwise engaged

in manual labour,' refer to labour *ejusdem generis* with the specific kinds before mentioned. It seems to me, therefore, that an omnibus driver is not within any of the definitions of a workman in section 10 of the Employers and Workmen Act, 1875." Mr. Justice A. L. Smith said: "I entirely agree with my brother Day that 'labourer' cannot, in its ordinary acceptation, include an omnibus conductor; and I think it is equally clear that he cannot be included in the term 'journeyman.' Then, is he a person 'otherwise engaged in manual labour' within the meaning of section 10 of the Act of 1875? I think not. *The mere fact that a man works with his hands is not enough to constitute him a workman within that section.*"

The view of the English judges seems to us to be the correct one. When the Act speaks of being engaged in manual labour, it means manual labour as a man's main occupation. Manual labour is involved in many occupations,—a clerk's, for example, in which it is only incidental to the main business in which he is engaged, and in these cases it would be absurd to speak of the man being engaged in manual labour. Such a case appears to be that of the tramway conductor. What are his duties? To collect the fares, and to give the signal to stop or to start. Neither of these come under the head of manual labour.¹

According to the definition in section 10, the person must further be one who "has entered into or works under a contract with an employer, whether the contract . . . be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour."

It is not necessary to a claim under the Employers' Liability Act that the contract referred to in the definition should be one between the workman claiming and the employer. This is involved in the decision in *Morrison v. Baird*, above noted. In that case the claim could not have been sustained as relevant without affirming the proposition just stated, but it might have been rejected without reference to anything in the definition clause; the main contention which was negatived being founded on another section of the Act. So far as the definition clause is concerned, there is nothing to give rise to the idea that there must be a contract with the employer who is sought to be made liable. An

¹ The decision of the Queen's Bench Division in *Morgan v. London General Omnibus Co.* has been affirmed by the Court of Appeal (May 16). "The word 'otherwise' in section 10 of the Act of 1875 showed that the persons thereinbefore mentioned were engaged in manual labour. Bringing general knowledge to bear on the employment of an omnibus conductor, no one would say that such a person was engaged in manual labour. His real business was to invite people into the omnibus and to take the fares. No one using the ordinary English language would say that that was manual labour. As to the Scotch case of *Wilson v. Glasgow Tramway Company*, the decision was not binding on the Court, and he was unable to agree with it."—*Per Brett, M.R.* It may be remarked that it is not part of the business of a tramway car conductor to invite people into the omnibus. The old 'bus conductors touted for customers; the tramway car conductors do not.

opinion that this is implied in the definition seems, however, to have been entertained. In the third edition of *Fraser on Master and Servant* (p. 239), published prior to the decision in *Morrison v. Baird*, it is said: "The existence of *some* contract between them, though it be only an implied one, seems essential to the relation of employer and workman, as defined in the Employers and Workmen Act, 1875. In general, therefore, a workman in the service of a contractor will have no remedy *under the Act* against the contractor's employer for injury caused by the negligence of the employer's servants. This may lead to hardship, for, apparently, if the decision in the case of *Woodhead v. Gartness Mineral Co.*, 4 R. 469, be sound, the workman has no action at common law against his master's employers, at least in the absence of personal fault on the part of the employer." And an indication of opinion that this definition clause bore upon the question involved in *Morrison v. Baird* seems to be contained in the remark of Lord Rutherford Clark in that case: "especially in regard to the statute of 1874, my difficulties have been considerable in forming my opinion." The definition clause imported into the Employers' Liability Act merely defines the *class* of persons who are entitled to the benefits of the Act; it does not determine the *relation* with which the Act is concerned, which was the question in *Morrison v. Baird*. Nothing in this definition clause could have excluded the pursuer in that case. He was a workman who had entered into a contract of service, and the clause requires no more.

The contract must be a contract of service or one "personally to execute" the work. In regard to the latter class, it was held in *Grainger v. Aynsley* (1880), L. R. 6 Q. B. D. 182, that a contract was one "personally to execute the work," although the workman was assisted and intended to be assisted by men whom he employed and paid for that purpose. In *Stuart v. Evans* (1883), 31 W. R. 706, a builder erecting some buildings engaged a slater to do the slating at so much the piece. One objection taken to a claim by the slater's representatives was that he was not a workman in the sense of the Act, the contract being a contract for the work, which it was immaterial whether he executed himself or not. The Court of Queen's Bench (Watkin Williams, Cave, and A. L. Smith, J. J.) unanimously held that the man was a workman in the sense of the Act. "It was an ordinary employment of a man without any special terms, and therefore on the terms he usually worked on as a jobbing workman, who did not usually employ other persons to work for him," *per* Watkin Williams, J.

Seamen.—The Employers' Liability Act does not apply to seamen. The Employers and Workmen Act, 1875, specially provides, section 13, that it "shall not apply to seamen or apprentices to the sea-service." No doubt by a subsequent statute this section is repealed as a substantive provision, but it remains so far as its referential character is concerned. Section 11 of the Merchant

Seamen (Payment of Wages and Rating) Act, 1880, provides that this 13th section "shall be repealed in so far as it operates to exclude seamen and apprentices to the sea-service from the said Act;" but it is provided that "such repeal shall not, in the absence of any enactment to the contrary, extend to or affect any provision contained in any other Act of Parliament, passed or to be passed, whereby workman is defined by reference to the persons to whom the Employers and Workmen Act, 1875, applies." Consequently, so far as the Employers' Liability Act is concerned, section 13 remains unrepealed, and seamen are excluded from the operation of the Employers' Liability Act. The result of this system of reference, repeal, and re-reference is, that the class of persons to whom the Act is to apply is not set forth expressly in the Act; but the information is that it is a class of persons to whom an Act with a different scope and purpose applies, to some of whom it did but does not now apply.

Is a fireman, stoker, or engineman on board a steamship a "seaman," or is the term to be taken in its acceptation of an ordinary sailor doing mariner's work? In *Wilson v. Zulueta*, 49 L. J. (Q. B.) 19, under a Stamp Act an agreement as "firemen and stokers" was held to come under a clause as to labourers or artificers, not under a clause as to mariners. Chief-Justice Erle remarked, however, "Though I put this limitation upon the present agreement under the words of the Stamp Acts, I do not mean to say that the same words may not, as is known to be the case, have a more extensive meaning under other Acts, nor that persons in the same situation going to sea may not agree to take upon themselves the duties and liabilities of mariners in some respects." In the case of *Grace v. Cawthorne*, April 26 (reported in the *Times*, and referred to in the *Law Times* of May 5), the Queen's Bench Division held that a fireman in a steam vessel was a seaman, and so did not come under the Employers' Liability Act. The ground of decision appears to be that under "seamen" are included all persons who form part of the organization of the ship. In *Oakes v. Monkland Iron Co.*, Feb. 21, 1884, 21 *Scottish Law Reporter*, 407, it was held that a fireman employed on board a steam barge plying exclusively on a canal is not a "seaman." This was held not in respect of the pursuer being a fireman, a point which was not even argued, but in respect of his being engaged on a canal boat. In the opinions of the Court, a considerable amount of consideration was given to the definition of the word "seaman" in the Merchant Shipping Act, 1854, an Act to which there is no reference in the Employers' Liability Act, or the Employers and Workmen Act. All this seems to us to be quite beside the question. In determining the meaning of a term under a particular Act, the worst place to go to for assistance is the interpretation clause of another Act of a different scope and purpose, where, for the special purposes of the Act, a special defini-

tion of that term is given. Nobody can question the soundness of the decision in the case of *Oakes*, that a canal bargeman is not a seaman; but the plain ground for the decision and the only relevant consideration in the inquiry is this, that a canal is not the sea.

(To be concluded in our next number.)

A BLUNDER IN THE AGRICULTURAL HOLDINGS (SCOTLAND) ACT.

A QUESTION was answered the other day by the Lord Advocate in the House of Commons with reference to a matter which has given rise to considerable doubt and difficulty amongst country practitioners, land agents, and farmers. Section 28 of the Agricultural Holdings (Scotland) Act of last year provides—

“Notwithstanding the expiration of the stipulated endurance of any lease, the tenancy shall not come to an end unless written notice has been given by either party to the other of his intention to bring the tenancy to an end—

“(a) In the case of leases for three years and upwards, not less than one year nor more than two years before the termination of the lease:

“(b) In the case of leases from year to year or for any other period less than three years, not less than six months before the termination of the lease.

“Failing such notice by either party, the lease shall be held to be renewed by tacit relocation for another year, and thereafter from year to year.”

Now it will be observed that this provision is on the face of it subject to no special limitation or qualification in regard to the date at which it is to come into force. The Act came into force upon 1st January of the present year, and accordingly, if the ordinary canons of construction be applied to the provision in question, it must be held to be operative as from that date. But to give such effect to the provision would lead to most anomalous results. The Act requires a year's notice in the case of a tenancy of more than two years' duration, and accordingly, in order to meet the case of such a tenancy expiring at Whitsunday 1884, notice would require to have been given by Whitsunday 1883, several months before the Act was passed. Accordingly it has been decided in the Sheriff Court of Caithness that this provision of the Act must be held not to apply to the case of leases so expiring; and this decision seems a sound one. Another question, however, of greater nicety remains to be disposed of. The case of a tenancy for upwards of three years expiring at Martinmas 1884, or of a tenancy for less than three years expiring at Whitsunday 1884, is on a different

that the Judges of the First Division were not so readily disposed to entertain the plea of *lenocinium* as their brethren in the Second had been. The Lord President said: "In order to make out a defence of *lenocinium* in a case such as this, it is essential (1) that the expressions must be used with the intention of inducing the wife to return to her old mode of life, and be so understood by the wife; and (2) they must be acted upon by her with this understanding, and be the cause of the subsequent adultery." But what obviously weighed with Lord Young in deciding *Marshall's* case was the fact that the pursuer had married the defender in full knowledge of her previous career. "Divorce," as he remarked, "is not granted in punishment to the guilty party, but as a remedy to the injured. Now, can one say that the pursuer here is an injured party?"

Beveridge v. Kinnear & Company, December 21, 1883 (Second Division), raises an interesting point relating to the law of separation. A load of oilcake was being lowered into a cart from the premises of A. It had to pass in its descent a flat belonging to B. A door in this flat being insecure, caused part of the load to fall out and upon a boy, who was killed. The Court here decided that B was liable in damages in an action at the instance of the boy's father. The peculiarity of the case of course lies in the fact that the fatal injuries were not caused by any act of B. The Sheriff (Trayner) held it "clearly proved that the door gave way under a pressure which was applied to it, not by the defenders or any of their servants, but by a stranger." Upon this ground he assoilzied the defenders. But the Court of Session, proceeding upon the same facts, came to a different conclusion in point of law. Query—Has B a good ground of relief against A for causing the descending load to press against this door? We think not, judging from the view taken here by the Court.

In *Brown*, petitioner, December 22, 1883 (First Division), a will was written on three pages of a sheet of paper and part of the fourth. It was signed on each of the three pages and at the end. A codicil, commenced upon the fourth page, but not signed there, was continued and signed upon a separate sheet. The Court here sustained the validity of this codicil, upon the authority of *McLaren v. Menzies*, 3 R. 1151. In *McLaren's* case, a deed consisting of more than one sheet was held sufficiently authenticated by the subscription of the granters upon the last page. In *Brown's*, it will be observed, there was actually a signature occurring upon each page.

We note two cases relating to Sheriff Court Appeals. The Act of Sederunt of 15th July 1876 provides that where eventually there "is an interlocutor allowing a proof or approving of issues, the expense of precognitions taken before the action was raised may be allowed." In *Church v. Caledonian Railway Company* (First Division), 22nd December 1883, a proof had been allowed

in the Sheriff Court. The case was taken to the Court of Session for jury trial, and an order for issues was made in that Court. But before anything further was done the case was compromised. When the question of expenses came to be considered, the First Division held that as this Act of Sederunt applied only to Court of Session procedure, and as no order for proof or interlocutor approving of issues had been made in that Court, the expenses of the precognition could not be allowed. This seems rather a hard decision; but doubtless the Supreme Judges are the best interpreters of their own legislation.

In *Blaikie v. Sinclair* (First Division), 9th Jan. 1884, a Sheriff Court interlocutor, finding a pursuer entitled to decree for the sum sued for, under deduction of the amount consigned, granting authority to the pursuer to uplift this sum, appointing him to lodge a state showing interest, reserving the question of expenses, and decerning *ad interim*, was held to be an interlocutor under the meaning of Section 24 of the Act of 1853, being an interim decree for payment of money, and therefore one which could be appealed to the Court of Session. The difficulty here was that, on the one hand, if the appeal was refused, the pursuer might walk away with a sum of money, leaving the defender without the remedy of an appeal; while, on the other, the interlocutor could hardly be considered with reference to the merits of the case, seeing that if it was, this would be treating it as a final interlocutor, which it was not. The Court sustained the appeal "as competent in so far as it brings under review that part of the Sheriff's interlocutor which grants warrant to the pursuer to uplift the sum, and thus, to their own satisfaction, got out of the difficulty.

The case of *Anderson and Another* (Second Division), Jan. 9, 1884, raised a curious question, viz. What is to be done when the petition and relative documents in a sequestration process have been lost or destroyed? Here the Court were asked to authorize the minute of the meeting of creditors and other productions to be received into process, in order that the trustee's election might be confirmed and the sequestration proceeded with. This the Court refused to do. Lord Young held that there must either be an action of proving the tenor or an application under the 15th Section of the Act of 1868, which allows copies, in certain circumstances, to be substituted for the originals.

In *Clarke v. Muller* (First Division), Jan. 12, 1884, the Court refused to allow an undischarged bankrupt to sue an action of damages for slander; in respect that his trustee refused to sist himself, and the bankrupt did not find caution. The Lord President, after pointing out the rule relating to actions by undischarged bankrupts, said: "I was under the impression that there was one exception to this rule, namely, that if the action was one for vindication of character, the pursuer was entitled to

bring it without fulfilling the condition of finding caution for expenses. But I am satisfied that the exception has not been established." He admits, however, that the Court has a discretion in the matter which may be exercised in rare cases. Another recent decision, which also relates to an action for slander, has been given in what Lord Shand calls a case of "difficulty and delicacy." We refer to *Paul v. Jackson* (First Division), Jan. 23, 1884. It was a case in which no issue of *veritas* had been taken, but in which the defender unsuccessfully sought to prove certain facts, with a view to the modification of damages. The extent to which proof may be admitted in the absence of an issue of *veritas* is thus stated by the Lord President, whose remarks sufficiently show the delicacy of the distinction to which a series of decisions has given rise. "Nothing," his Lordship says, "is better settled in practice, than that a defender is not entitled, without a counter issue, to prove the truth of the statements complained of, or any part of them, in order to mitigate damages, or for any other purpose whatever. It is equally well settled, however, that a defender charged with slander is entitled to lay before the jury the circumstances in which the slander was uttered, in order to prove the state of his information with regard to the subject matter, and to show that the offence and consequent injury to the pursuer is not so great as is represented, and so to diminish the amount of damages." In this case the defender Jackson was not allowed to go into a proof of averments, which would have warranted an issue of justification. "I do not," said Lord Deas, "know any rule that is better established, than that *veritas convicii* cannot be proved in whole or in part without an issue in justification; nor I do not know any better established rule than that which provides that what cannot be done directly cannot be done indirectly."

From the opinions expressed in this case, it is clear that such evidence can only be led with a view to mitigation of damages, as would be incompetent for the purpose of establishing an issue of *veritas*. The defender here sought to prove that certain threats had been made against him, and this he was not allowed to do. But the Lord President said: "I think it possible for the defender to prove the prevalence of reports, or the fact that a particular person told him threats had been used of this nature." The principle of the distinction thus suggested is not clear. Surely it would be an easy and safe rule to lay down, that no matter what a defender proves, he is not entitled to a verdict upon the score of *veritas* unless he takes an issue of *veritas*. Why may a man, in order to show the provocation under which he acted, prove the report of an alleged fact, and not the fact itself?

The case of *Wauchope v. Wauchope*, Jan. 25, 1884 (Second Division), heard before seven judges, presents a very perfect puzzle in the way of construction of a clause. In the entail of

the Niddrie estate, deeds done in contravention of the provisions of the entail were declared not only to be null, "but also the contraveeners and descendants of the contraveeners' bodys, if they be not descended of my (the entailer's) body, shall forfeitt and tyne their right to the said estate." It was contended, on the one hand, that this provision rendered the deed invalid, because it enabled subsequent heirs of entail, if descended from the entailer, to contravene the provisions without forfeiture. This view was adopted as the sound one by the majority of the Inner House Judges. But an equal number of Lords of Session were in favour of another reading. The latter held that under this clause all contraveners would forfeit their right to the estate; but that, in the event of any contravener not being descended from the entailer's body, his act would also involve the forfeiture of all his own descendants' rights. Doubtless this case will go to the House of Lords.

The case of *Moffat v. Boothby*, February 1, 1884 (Second Division), belongs to a class which, although very common in the Sheriff Court, and especially in the Small Debt Roll, rarely appears in the Court of Session. A master dismissed his servant because of a refusal to perform work which the latter maintained he had not been engaged to do. He was employed as a shepherd at a yearly wage. It was understood that he was also to assist in cutting hay and corn, but nothing had been said at the time of engagement about cattle. He was, however, afterwards ordered to attend to the cattle at the steading during the winter. Having refused to do this, and been dismissed, he brought this action against his master for wages and board wages. The Sheriff-Substitute decided in his favour, the Sheriff (Pattison) against him, being of opinion that "to encourage such hair-splitting as to the duties of a young man engaged on a farm as the pursuer was, would be fraught with injury both to master and servant." But the Court of Session did not characterize the pleading of the pursuer as hair-splitting. Lord Young was of opinion that the work demanded of him was "entirely outwith a shepherd's duty, and in the absence of special agreement not a duty which he could be called upon to perform;" and the Lord Justice-Clerk concurred, although he admitted that he had felt no favour towards the pursuer's case when he read the papers. Lord Rutherford Clark rather favoured the master, although he did not formally differ from the majority. This decision would seem distinctly to recognise the principle that a servant is entitled to refuse to do work which he has not been engaged to do, upon that ground alone, without also showing that this work is incompatible with the performance of his regular duties.

In a filiation case, *Scott v. Dawson*, February 2, 1884 (Second Division), the Court admitted evidence of familiarities which had taken place some years subsequent to the birth of the child,

although no averment relating to them appeared in the pleadings; expressions of opinion were, however, given to the effect that it would have been better and fairer had notice of this kind of evidence been duly given.

By the case of *Ramsay v. Strain*, February 6, 1884 (Second Division), an important distinction in clauses of arbitration is well illustrated. Nearly one hundred years ago a disposition of coal mines was granted, which contained a provision for the settlement of questions of damage done to the surface, by means of arbiters to be mutually chosen. In an action recently raised, and founded upon such alleged damage, this clause was pleaded as a bar to proceedings in the Court of Session. The Lord Ordinary, holding that this was a reference provided simply for the purpose of liquidating an obligation, considered it valid, although the arbiters were not named. But the Inner House took the view that there was here a question of fact, viz. whether or not the pursuer's authors had already been paid many years ago for all the damage done, and therefore were of opinion that the reference being to unnamed arbiters was invalid. The distinction is pointed out by Lord McLaren, who says, "The rule against references to persons unnamed is a general rule of the law of Scotland, founded on considerations of public policy. The rule applies only to references of matter in dispute; but when the parties to a contract are able to come to an agreement as to their relative obligations, and desire that the compensation to be paid by the one to the other for something done in execution of the contract should be fixed by a referee, this is not regarded as a dispute in the sense of the rule, and such a reference will be effectual although made to persons to be mutually chosen."

In the case of *Dunbar v. Macadam*, March 5, 1884, the Second Division considered the course to follow in an appeal from the Sheriff Court where no appearance was made for the respondent, viz. whether to hear the appeal and determine the cause upon the merits, or to give judgment by default, without calling upon the appellant to establish his case. In *Stewart v. Stewart*, 9 Macp. 740, this latter course was followed. But, after reconsidering the matter, and consulting with the First Division, the Judges of the Second have now decided in all such cases to call upon the appellant to show cause why the judgment appealed against should be reversed. In Dunbar's case the appeal was dismissed.

In *Henry v. Miller*, March 18, 1884 (First Division), the defender, who was sued for rent, produced a receipt. The pursuer averred that this receipt had been sent to defender along with a note, but that the rent had never been paid. The Court allowed the pursuer a proof at large of this averment. The question whether proof should be limited to writ or oath was admitted by the Lord President to be one not unattended with difficulty. One point was much in favour of the defender. The rent alleged to

be due by him was not demanded until a year after the receipts had passed into his hands. But, as the Lord President remarked, "it is clear that a document, whether of debt, which this is not, or a receipt for money, may get into many hands, either accidentally or by error. And there appear to be no good grounds why, if it can be proved that the document got into many hands through fraud, it should not also be competent to prove that it got into many hands by error or accident." This decision is one of considerable importance, as the principle would apply to all kinds of receipts. But undue delay in making the claim would under such circumstances probably have the effect of limiting the proof. Here the Court felt some difficulty, because of the interval of one year, and the Lord President said, "If the lapse of time were greater, I should have a strong sympathy with the defender." Does not this decision point to a gradual relaxation of the old tendency in favour of restricting proof?

In the case of *Kerr v. Maxwell Witham*, March 20, 1884 (First Division), the Court rejected the vote of a claimant in bankruptcy proceedings when the claim was founded upon bills long overdue, and the holder had been a joint tenant with the bankrupt, and engaged in a joint speculation with him. This was held to amount to a case of confident and conjoined persons. The question was also here raised, whether it is competent for a trustee in a sequestration to act as mandatory for creditors. The Lord President mentioned that he had consulted with the Accountant in Bankruptcy, who informed him that it was a common practice for trustees so to act. "I can only," his Lordship then remarked, "say that I am sorry to hear it. It is not only a mode of procedure of which I cannot approve, but one which I earnestly trust may be discontinued. I cannot conceive anything more undesirable than the trustee in his quasi-judicial proceedings acting for one set of creditors and against another." The other Judges present concurred in this opinion, holding the practice to be undesirable and improper.

In *M'Fadyean v. Campbell and Others*, March 11, 1884 (Second Division), the question was raised as to what is proper notice to a trustee of a meeting having been called to consider the matter of his removal. The 99th section of the Bankruptcy Act provides for a *Gazette* notice seven days before the day of the meeting, and also a special notice to the trustee. The Judges, although in the circumstances of this case it was unnecessary to decide the point, were inclined to hold that the notice to the trustee must in point of time precede that given to the public by the *Gazette*.

Reviews.

On Insanity and Nervous Disorders peculiar to Women, in some of their Medical and Medico-Legal Aspects. By T. MORE-MADDEN, M.D., etc.

THIS is a valuable paper; but it does not touch on new matter, and it deals only indirectly with any point of medico-legal interest. The author's purpose is to show that many people at present confined in asylums are not mad, but are merely suffering from the reflex nervous consequences of curable utero-ovarian disease. He condemns the present regulations with regard to certificates for the admission of persons into asylums,—by any two registered practitioners, “neither of whom has necessarily been qualified for a week or ever treated a patient;”—and he suggests that these certificates should be given by two *official* medical inspectors of lunatics.

The Law and Practice of Compensation for Taking or Injuriouly Affecting Lands, under the Lands Clauses Consolidation Acts, 1845, 1860, 1869; Railway Clauses Consolidation Act, 1845; Artizans' and Labourers' Dwellings Improvement Acts, 1875 and 1882; Artizans' Dwellings Acts, 1868 and 1882; Public Health Act, 1875; Elementary Education Act, 1870; General Metropolitan Paving Act; and other Public Acts (English, Irish, and Scotch), with an Introduction, Notes, and Forms. By SIDNEY WOOLF, of the Middle Temple, and JAMES W. MIDDLETON, of Lincoln's Inn, Esquires, Barristers-at-Law. William Clowes & Sons, Limited, London. 1884.

THE authors of this book say in their preface that they “took into consideration the two alternative plans of writing a law book, viz.—(1) a treatise on the subject; (2) a collated and annotated edition of the statutes relating thereto.” They have wisely chosen the latter. Indeed, on a subject such as Statutory Compensation, depending almost wholly upon the construction of Acts of Parliament, any other course would have been of but little service to the profession. The decision of the questions raised turns upon the meaning of particular enactments taken either by themselves, or construed by other statutory provisions, and it is only incidentally that principles of common law are discussed. A treatise on a branch of the law created by statute is apt to be misleading. The paraphrase of the writer is taken as equivalent to the words of the section, and a very slight alteration may disguise its true meaning. No treatise on Statute Law can supply the place of the Act itself, though it may be useful in providing a summary of

the enactments, in explaining their purpose, and in calling attention to any modification of common law which has been effected by it. An introduction can fulfil these objects equally well as, or even better than, an elaborate treatise; while notes, more or less elaborate, will prove far more effective in guiding the reader to the true construction of the Act commented on. The object of the commentator should be to facilitate the consultation of the Act, by giving under each section either all the information necessary for its construction, or at least the sources where that information may be readily obtained.

In the Introduction a useful summary is given of the Lands Clauses Consolidation Act, as well as a digest of Sir Richard Cross's Acts, and Mr. Torren's Acts, both issued by the Local Government Board. The Lands Clauses Act is carefully annotated; and in the notes will be found references to most of the numerous cases which have explained the meaning of its provisions. Many of these notes extend to considerable length; and we think it is unfortunate that the authors have not divided these notes into smaller notes, and indicated in the several sections the words or clauses which are explained in the notes. Thus the note on section 18 extends to eight pages, but might have been broken up into six or seven parts, each of which refers to separate words in the section. It would have greatly facilitated the consultation of the notes, if each of the words in a section explained and commented on had either been printed in italics, or if a number or letter had been inserted referring to the note below. The Lands Clauses Consolidation Act has received such an amount of judicial interpretation, that there is little room left for a commentator to discuss the meaning and bearing of the different sections; but in the more recent Acts there was certainly an opportunity for independent explanations, which would have given material assistance in the construction of their elaborate provisions. It is one of the most striking differences between an English and a foreign law book, that in the former those portions of the law, whether statutory or common law, are treated of in an exhaustive manner which have formed the subject of frequent judicial determination, while other parts, perhaps equally important, are passed over with little or even no notice. In foreign law books, on the other hand, the subject, if not always discussed with sufficient minuteness, is expounded with a due appreciation of the relative importance of its parts. An English law book, accordingly, is apt to be little more than a good guide to decided law, but fails the lawyer who wishes direction in a question on which the Courts have not adjudicated. This is, of course, felt more especially in books on common law; but in commentaries such as the one with which we are dealing, we miss annotations often where we most want them. Thus the notes on the Artizans' Dwellings Acts are much fewer than they might have been.

The Scottish Acts follow the English Acts so closely that the authors have only taken the proper course when, in place of annotating them separately, they have referred to the rules on the corresponding sections of the English Acts. The references to Scottish cases are full, but it is a little curious that no Scottish case since July 1877, when the last Digest of Decisions was published, is quoted with the exception of those which have gone to the House of Lords. It would not have involved a great amount of labour to go over the recent volumes of *Rettie*, and to pick out the cases referring to the Acts commented on. On page 649 we notice an omission. It is there said that the Artizans' Dwellings Act of 1875 has not been amended by the Act of 1879; but it ought to have been added that by the amending Act of 1880, clauses to the same effect as those in the 1879 Act have been added to the Scottish Act. In annotating the Scots Acts, the cases decided on particular clauses are too frequently referred to, without any indication of the points in the clauses which they elucidate.

All those who are engaged either in carrying out great public undertakings, or assisting in the working of the provisional orders, which from year to year are being passed for the improvement of our great towns, will find this book of great use in enabling them readily to ascertain the meaning of the provisions of the Acts to which they must conform.

Admiralty Forms and Precedents, with Notes of the Practice relating thereto, and an Appendix containing the Rules of the Supreme Court, 1883, which relate exclusively to Admiralty Actions, and the Order as to Court Fees, 1884. By EDWARD STANLEY ROSCOE, Barrister-at-Law, Author of a "Treatise on the Jurisdiction and Practice of the Admiralty Division of the High Court of Justice." William Clowes & Son (Limited), 27 Fleet Street, London. 1884.

MR. ROSCOE has collected in this volume a number of forms for use in Admiralty cases in the High Court of Justice, which will no doubt be found very useful by practitioners before that Court, especially in view of his statement that "the new Rules are not a safe guide to the practitioner." The carelessness of drafting to which we are accustomed in Acts of Parliament, has apparently extended to the Rules framed by the Judges. "The very first time," Mr. Roscoe says, "that the form of a statement of claim in a salvage action came before the Court, it was pronounced to be useless, and it has had to be discarded, together with the form provided for use in actions for damage by collision." To Scots lawyers this book is interesting from the illustrations it affords of the difference between the pleadings and our records.

The advantage is, we think, with the latter. The English statement of defence does not deny or admit the statements in each article of the statement of claim, and consequently room is left for much vagueness, and doubt as to how far the parties are at variance. It is, however, worthy of consideration whether the English forms for arresting ships, and bringing the case into Court might not be adopted. The Scottish warrant to arrest *ad fundandam jurisdictionem* requires to name the owners of the vessel, and if only some of these be named, no jurisdiction is founded against the others, and a failure of justice may thereby happen, as in the case of *Anderson v. Harboe*, 10 M. 217. In England the warrant is to arrest the ship A. of the port of B., without naming the owners, and in the writ of summons the owners and parties interested in the ship A. of B. are called without naming them. The service of the writ on board the vessel is very properly held to be notice to the owners. It is surprising that the inconvenience of our mode of bringing an Admiralty cause into Court has not been more felt, and has not been remedied. The procedure in the English Court seems somewhat cumbrous, and the notices of the various steps given by one side to the other to be unnecessarily formal and prolix. A comparison of the forms given by Mr. Roscoe with those in use in our Courts will be found suggestive, and we would specially call attention to the particulars required to be set forth in the preliminary act by either party, page 145.

Cremation: The Treatment of the Body after Death. By SIR HENRY THOMSON, F.R.C.S. Third Edition. London: Smith, Elder, & Co.

THIS pamphlet deserves the careful study of all interested in the sanitary wellbeing of the community. It consists, first, of a reprint of an article by Sir Henry Thomson which appeared in the *Contemporary Review* of January 1873; a reply having been inserted the following month, Sir Henry wrote a second paper in defence of his first, and this has also been reprinted. It is followed by an interesting paper, which was read by Sir T. Spencer Wells at the meeting of the British Medical Association at Cambridge in 1880. These, however, though no doubt valuable in themselves as expressing the views of eminent scientific men with reference to cremation, did not up to this time possess much practical importance, as the Cremation Society had never been able to persuade the Government to sanction the carrying out of their objects. But matters are now on a different footing, in consequence of its having been laid down by no less an authority than Mr. Justice Stephen, that the burning of a body after death, provided the operation is conducted so as not to become a public nuisance,

is not illegal. This *dictum* was expressed in the charge of the learned judge to the grand jury at Cardiff last February, on the occasion of the trial of William Price for burning the body of his child. The charge is extremely interesting and suggestive, containing as it does a concise view of the funeral rites of various communities. There is much learned quotation from Van Espen to Sir Thomas Browne, and the few cases in which the subject has come before the Courts are duly recorded. Whether or not our readers approve of cremation, we should certainly recommend them to read this pamphlet, in which they will find everything that can be urged in support of the practice set forth with ability and candour.

The Land Question: A Reply to Dr. Russell Wallace and Mr. Henry George. By JAMES MURDOCH. Glasgow: published by the Associations of House Factors and Landlords in Glasgow.

THIS pamphlet was read as a paper at a meeting held within the chambers of the Glasgow Landlords' Association, and contains a clever and convincing reply to what after all are the very shallow sophisms of Messrs. Henry George & Co. Mr. Murdoch has evidently considered his subject carefully, and there is evidence in the pamphlet of considerable research in the somewhat arid fields of blue-books and reports. We do not agree with all the views the author has expressed in his paper, but we may safely say that it is interesting and able.

The Liquor Laws of Scotland, including the Licensing and Excise Enactments presently in force, with Report by Royal Commission on Grocers' Licences, Ruling Decisions of the Supreme Court from 1862 to 1884, and Explanatory Notes and Index. By DAVID DEWAR, Chief-Constable and Procurator-Fiscal for the Burgh of Dundee. Edinburgh: William Green. 1884.

IN this volume, which, as the preface states, "contains copies of ten public general statutes, and all the operative clauses directly affecting the liquor traffic, extracted from nineteen public general statutes and seven local statutes, with notes," Mr. Dewar has attempted too much, and has in consequence accomplished little. The statutes and excerpts from statutes here collected deal with branches of the law clearly separated by strong lines of demarcation. The Home Drummond Act, the Forbes Mackenzie Act, the Public Houses Amendment (Scotland) Act, 1862, and Dr. Cameron's Publicans' Certificate Act, with its Amendment Act, are the statutes which affect the largest number of persons engaged

in retail liquor traffic. It is these statutes which regulate the methods by which certificates are obtained from the magistrates, the indispensable preliminary to obtaining a licence from the Commissioners of Inland Revenue. They lay down rules of procedure in prosecutions for breach of certificate, or against illicit traffickers in liquor. And these statutes have been already collected and commented upon by the late Sheriff Barclay, and by Mr. Irons, with a fullness and accuracy to which the present work cannot lay claim. It is to these statutes alone that the digest of cases collected by Mr. Dewar refers. The Liability of Innkeepers Act, 1863, and the Innkeepers Act, 1878, affect only those who possess hotel licences. These Acts deal with the civil liabilities of innkeepers, and are of little use as guide to an innkeeper's legal position without a commentary on the Edict *Nautæ Caupones stabularii*. It is therefore not easy to see what good purpose is served by linking these Acts with those previously mentioned. Again, Excise law is really a separate field, and affects a class of persons different from that affected by the Public House Statutes. Mr. Dewar supplies no commentary here, and we look in vain for any explanation of the mysteries of "grogging," and the penalties attached thereto. The excerpts from the Army Acts are not complete without the sections of the Acts which deal with the licensing of military canteens. The report of the Commission on Grocers' Licences is interesting. But it is not of much service in a work on the Liquor Laws. The digest of cases is confined to those decided by Scottish Courts, and is carefully made up to date, although it is disappointing to miss the well-known Rothesay case of *M'Beth v. Ashley*, April 17, 1874, 1 R. (H. L.) 14, which decided that it was *ultra vires* of the magistrates in a whole burgh to change the statutory hours of closing public houses. Mr. Dewar's notes are accurate. But one slip may be mentioned in the note on section 25 of the Home Drummond Act. Although that section was repealed by the Statute Law Revision Act, 1873, it was re-enacted by the Statute Law Revision Act, 1875, sec. 3. The book is well printed and handy in form. But those who desire further guidance than can be had from the mere text of the Acts of Parliament will require to seek it elsewhere.

Legal Recreations: Lyrics of the Law. By J. GREENBAG CROKE.
San Francisco: Sumner, Whitney, & Co. 1884.

THIS neatly got-up little volume is described on the title-page as containing "a recital of songs and verses pertinent to the law and the legal profession, selected from various sources." The editor has certainly collected the one hundred or so pieces which the book contains from a very wide field. On the whole, it may be said that the verses are clever and amusing, though we cannot

help hoping that in the majority of instances the author's legal attainments were superior to his lyrical powers. Scottish lawyers are well represented in this book. Outram's *Lyrics*, Lord Neaves' *Songs and Verses* and *Ballads of the Bench and Bar*, have all been laid under requisition; and although we Scots people have never been credited with the possession of much fun, we must say that in our opinion our own countrymen make as good a show as any. We trust that it is not mere national partiality which leads us to consider Outram's *Annuity* as quite the best thing in the book. We must at present resist the temptation of quoting anything from the pages now before us, but we can safely recommend the book as the very thing with which to fill up an idle half-hour. Some brief but useful notes on the different pieces are given at the end of the volume.

The Month.

The Law of Cremation.—The decision of Mr. Justice Stephen in the case of *Regina v. Price*, reported in the April number of the *Law Journal Reports*, upon the legality of cremation, is of great interest. It is seldom that an opinion delivered on circuit finds its way into the regular reports, and still more seldom that a charge to a grand jury is reported. In fact, the conditions upon which charges to the grand jury take place render it almost impossible that they should be reported. A report, to be capable of citation in a Court of law, must have the authority of a barrister's name; but by an invariable rule of the bar, no barrister is present when the judge charges the grand jury. Various reasons have been given for this rule of etiquette. The cynical reason is that the judge does not care that the bar should hear him make the same moral observations to grand juries all round the circuit. Another is that counsel, who may afterwards defend prisoners, ought not to have the opportunity of picking up hints of the judge's views from the comments which he may make to the grand jury. The best reason, however, is that the available space in the Court is reduced by the presence of the grand jury, and as counsel have no business there, they had much better stay away. In the present instance, the learned judge has been his own reporter, for he has been good enough to supply the text and head-note, and to correct the proofs. The form of the opinion follows the charge to the grand jury; but the learned judge directed the petty jury at the trial of the indictment in the same terms, so that the opinion has the weight of a decision at the assizes. It has the further weight of being the opinion of Mr. Justice Stephen. The learned judge has decided in favour of the legality of a practice which of late years has obtained many advocates, but the well-known soundness of his opinions on the

theory of the development of law to suit modern convenience, which is not without disciples, places him beyond the suspicion of being guided by other considerations than are to be found in dry legal science, while his unstinting industry and wide reading make it peculiarly fortunate that the decision of this important question should have fallen to his lot.

The reader of the case will be struck in the first instance with the fact that Mr. Justice Stephen under-estimates the authority against him on this question. When his decision was first reported in the newspapers, it was pointed out in these pages that "it was contrary to a *dictum* of Mr. Justice Kay in *Williams v. Williams*, 51 Law J. Rep. Chanc. 385." The reader will be surprised to find that Mr. Justice Stephen does not attribute even the force of a *dictum* to the judgment in that case. He says: "The case (*Williams v. Williams*) leaves the question now before me undecided. 'The purpose,' says Mr. Justice Kay, 'confessedly was to have the body burned, and thereupon arises a very considerable question whether that is or is not a lawful purpose according to the law of this country. That is a question I am not going to decide.'" Further on Mr. Justice Stephen says "the learned judge expressed no opinion on the question on which it now becomes my duty to direct you." Mr. Justice Stephen was unfortunately misled by an imperfect report. He evidently had only the Law Reports before him, and the judgment of Mr. Justice Kay is there reported (L. R. 20 Chanc. Div. 666) *verbatim* as Mr. Justice Stephen gives it. This was not, however, what Justice Kay said. The reporter, at the crucial point, cuts the learned judge almost as short as the dramatist in Sheridan's burlesque cuts Whiskerandos off in the middle of a word. The judge must be allowed to finish his sentence, as he is in our report of the case. That report runs: "That is a question I am not going to decide, but I do not think it advisable that a judge should have a question of that kind raised before him without expressing his opinion upon it. My opinion is that cremation is not legal according to the law of this country." There can be no doubt that Mr. Justice Kay expressed this opinion. If confirmation be wanted, it is to be found in the report given in the *Law Times*, which is as follows (46 L. T. N. S. 178): "It is not necessary for me to decide that point, and I am not going to decide it, but I think it undesirable that a judge should have a point raised before him and not express his opinion upon it; and my opinion is that the purpose for which this direction was given—cremation—is not legal." Mr. Justice Stephen, however, was entitled to differ from Mr. Justice Kay, whose opinion, as he himself is careful to point out, was not necessary for his decision; and a judge, even though away from his books on circuit (although there is internal evidence that Mr. Justice Stephen was not very far from his books), is likely, after full consideration and consulta-

tion with his colleague, to form a better opinion on such a subject in reference to an indictment directly before him, than a judge before whom the point came only incidentally, and who decided it in passing, and without taking time to consider. The drift of Mr. Justice Stephen's argument may be very shortly stated. In the first place, he says that there is no authority for the proposition contended for by the prosecution, which he has been able to discover after the fullest examination. He admits that Courts have sometimes declared acts to be misdemeanours which have never previously been decided to be so, but suggests that those cases all "involved great public mischief or moral scandal." "I do not think," he adds, "that it can be said that every practice which startles and jars upon the religious sentiments of the majority of the population is, for that reason, a misdemeanour at common law." This view is supported by reference to the Anatomy Act, which appears to him to show that burial was not the only mode of disposing of bodies recognised by the Legislature. His decision, therefore, is that cremation *per se* is not illegal, and is not the subject of an indictment unless done so as to amount to a public nuisance. Upon the other question arising on the indictment—viz., whether it is indictable to prevent an inquest being held—he decides that it must be proved that an inquest was necessary.

Little criticism arises upon the result or the terms of Mr. Justice Stephen's decision. The main argument on which it is based appears conclusive. More weight, however, seems to have been given to the Anatomy Act than it seems to bear. This Act (2 & 3 Will. IV. c. 75) allows those lawfully in possession of bodies to permit them to be dissected, but afterwards they must be "decently interred." This, Mr. Justice Stephen contends, shows that there was no common law rule that bodies must be interred, as otherwise the enactment would be unnecessary. The argument might be used the other way, as showing that Parliament reinforced in this instance the burial of bodies obligatory at common law. In fact, the Act seems to impose the duty on a person on whom it would not be imposed at common law, viz. on "the party removing" the body for the purpose of dissecting. Without this enactment the person in whose custody it was for dissection would seem to have the duty of disposing of the body. The statute therefore does not much help, and even if it assumed the law to be contrary to what it really was, the law would not be altered unless expressly affected. Mr. Justice Stephen's position appears, however, to be strong enough without reference to the Anatomy Act.—*Law Journal*.

Solicitor versus Writer.—A meeting of the Glasgow Faculty of Procurators was held on 14th April in the Faculty Hall—Dr. Anderson Kirkwood, in the absence of the Dean (Mr. C. D. Donald), in the chair.

Mr. J. B. Fleming submitted the following motion:—"That this Faculty do now take into consideration the propriety of recommending the members of the legal profession in Glasgow who are members of this Faculty to abandon the custom of designing themselves 'writers,' and that they do hereafter design themselves as 'solicitors.'" In support of the motion, he said any proposition of this sort might be held to be such as should more properly emanate from the council of the Faculty. The council had, he believed, had the matter under consideration, and various suggestions had been made for adopting some initials distinguishing regular practitioners. F.P. was proposed, but was considered too suggestive of Fire Plugs, and no set of initials seemed to commend itself. It seemed, however, that if they were to wait till the council brought the matter before the Faculty they should have to wait a very long time, and though not a matter of the gravest urgency, still it was one upon which it might be well to get an expression of opinion. There were very few, he was sure, in the profession who had not found some practical anomalies arising from the use of the obsolete, but not time-honoured, name of writer. For himself, he knew he found the inconvenience so great that he had to have resort to two sets of calling cards—one with writer on it for use in Scotland, and another with solicitor for use furth of Scotland. It would have been more appropriate to have spelt the word "writer" as "righter;" for, he took it, however far they might fall short in their endeavours, they did endeavour to do right, and their duty certainly was to right the wrongs of their clients, and in that sense they were righters. However, he need not take up time pleading for a mere change in the spelling of the word, particularly considering that while their own clients believed implicitly, let them hope, in their doing right, there was always another set of fellows believing as implicitly that they were doing wrong, and that they were the most injured innocents in creation. It seemed to him the arguments against the continuance of the use of the name were simply innumerable, and he knew not what arguments could be used in favour of it except that it is, and whatever is is right, or in this case it might perhaps be put even more strongly—whatever is is writer. No doubt it had local use and went in its favour, and no doubt also it was Scottish. He had endeavoured to find out if it had any antiquarian, archæological, historical, or literary merits to commend it, but he could find none. In literature the word was generally to be found preceded by the libellous adjective drunken, and followed by the scarcely less objectionable noun "buddy,"—"A wee bit drucken writer body,"—and Burns, confessing his sins, says,—

"I've been at drunken writers' feasts."

No one could possibly be more conservative in their ideas than he

was, or more inclined to pay every respect to the good old maxim, "*Stare antiquas vias*;" but he could not see what good was to be done by staring at the ancient ways after they have been entirely obliterated and lead to nowhere but a maze of confusion, more especially when they are not by any means ancient after all. He should not doubt that writer is the modern form of scribe, and therefore had antiquity on its side. That might be to some extent true, but it was by no means a respectable antiquity. Scribes, according to the very highest authority, had the very worst associates. He defied any one almost to say scribes without saying Scribes and Pharisees—hypocrites. Scribe led to skriever, described in the Scottish dictionaries as an inferior sort of writer—a mean scribe. It led also to scribbler and scrivener, and here seemed to find as little favour as writer:—

"The scrivener Luscus, now with pride elate,
With incense fumed, and big with robes of state."

That, he supposed, could only now be held to apply to town-clerks, but with small burghs springing up all over the place we had a goodly supply of town-clerks. We had also an ancient divine speaking of "a pestilent band of libertine scribblers," and Dryden,—

"How happy in his low degree,
Who leads a quiet country life,
And from the gripping scrivener free."

No one seemed to have a good word to say for either writers or scribes or scriveners. An argument that was generally used for the retention of the name writer was that it was Scottish. He believed he was just as patriotic as any member of this Faculty, but he failed to see that that in itself was an argument. While it was desirable to preserve all that was Scottish that has a meaning, he saw no use in preserving what was utterly meaningless, and what throughout Scotland itself was not generally being preserved. In Edinburgh they had, of course, writers to the Signet. That had a meaning, and was worthy of preservation. The other practitioners were the solicitors before the Supreme Courts. That also had a meaning, and would no doubt be kept up. The state of affairs in Scotland, leaving out Edinburgh, therefore stood thus:—Solicitors, 11; procurators, 7; procurators and solicitors, 6; advocates, 1; law agents, 1. The preponderance thus already appeared to be in favour of solicitor. He could quite understand that thirty, forty, or fifty years ago, when the intercourse with England was infinitely less than it now is, that the name writer, while even then possessing nothing to commend it, possessed little to discommend it; but now-a-days it is very different, and, independent of England altogether, what did their own clients call them? Not writers certainly. Did any one ever hear one Glasgow

merchant saying to another, "Well, at last I had to put the matter into the hands of my writer, or my writers." Each and every one, however Scottish he might be in theory, would in practical everyday life say, "I put the matter into the hands of my solicitor or solicitors." Their English brethren had very sensibly copied from them in some things, such as the appointment of a public prosecutor, and they in Scotland might do well to follow suit and copy them in other things, such as the adoption of the name solicitor by those whose own clients talk of as their solicitors. With regard to the name solicitor as the best substitute for the name writer, he did not know that he could defend it against all comers as abstractly the most suitable, but he could certainly defend it on the ground of simple common-sense. There was no doubt that it would be universally understood, from Land's End to John o' Groat's, which writer was not. Since the passing of the English Judicature Act in 1873, the name solicitor had been applied to all persons practising before the Courts at Westminster, and throughout England "solicitor" was thoroughly understood. In Scotland, as he had shown, it was already largely adopted; in the United States of America and our own colonies it was in universal use. Mr. Fleming then moved the adoption of the motion that stood in his name.

Mr. George Black seconded the motion.

Mr. David Murray moved a negative to Mr. Fleming's motion. It seemed to him that neither on the grounds of principle nor expediency had he shown any good cause for the change that he advocated. A solicitor was one who solicited, not business from clients, but the intervention of the Court of Chancery, just as technically a bill is still solicited in Parliament. According to Mr. Fleming, "writer" was a new word; "solicitor" one of ancient standing and respectability. He disputed both propositions. Solicitor was a word of recent origin, and was not later than the sixteenth century. The concurrent word in England was attorney-at-law—a term as old as the Conquest. An attorney-at-law, as distinguished from an attorney in fact, was one deputed to appear or act for another in a suit before a Court of law, and precisely corresponded with the Scottish expression "law agent," which had recently been sanctioned by the Legislature. Originally the solicitors were clerks in the office of the six Clerks of Chancery, who, doing business on their own account for the outside public, as well as performing their official duties, gradually gave up the latter, and devoted themselves entirely to acting as agents for others. That was the origin of the solicitors. The only ground that Mr. Fleming could suggest why we should adopt the name "solicitor" was, that some unfortunate Scottish writer was kept standing for half-an-hour in the ante-chamber of an English brother, who mistook him for a text-writer in a law stationer's office. If we were to correct every blunder of ignorant Englishmen,

we should never end, and might as well swamp our country and institutions *en bloc* at once. The Legislature had dubbed them law agents, which, although not a very high-sounding title, was at least descriptive and accurate. Their friends on the south of the Tweed seemed to have a hankering after it, and not to be altogether set upon their own word solicitor, as in the Acts 1875, 1876, and 1877, they flourished under the title of "legal practitioners." Coming next to the despised word "writer," Mr. Murray said that it was an old name in Scotland—a title of great antiquity, and one which he hoped would flourish for many a day. If Englishmen did not understand it, so much the worse for them. That was no reason why we should alter it. It was a much more ancient name than even "attorney." Mr. Fleming had said quite rightly that at one time it meant scribe. Quite true, but it was not the scribe that he referred to—not the gentleman who associated with the Pharisee. The *scriba* was an officer in the Roman Courts. He was an officer of the Courts that succeeded these throughout the Middle Ages, and in our own country we had the *Scriba curiæ*. Translated into the vernacular, this was the writer, or the writer of Court—not the man of quill pen and flourishes, a stroker of "t's" and dotter of "i's," but what we would now call the registrar, or what the French call *greffier*. While we had writers in Court, they, like the clerks of the Court of Chancery, to whom he had before referred, began to do outside business, and "writer" came to be a general expression for a legal practitioner. A notary had certain duties to perform, well known and well defined. A procurator was a Court practitioner, so was an advocate. A writer, taking the analogy of the English scrivener, might be supposed to be limited to a conveyancer, but in practice this was not so, and the word simply meant a lawyer, not an advocate, practising all or any of the branches of the law. In Edinburgh they had Writers to the Signet, but Writers to the Signet was not their correct designation. They were properly clerks to the Signet. When the Court of Session was instituted, they were clerks in the office of the Secretary of State, whose successor is the Keeper of the Signet. Their sole and proper duty was to prepare such writs as required to pass the Signet. They had nothing whatever to do with Court practice. Indeed, at that time the advocate did everything on his own account. He performed the duties both of counsel and agent. The clerks to the Signet had gradually extended their duties from the Signet Office and became legal practitioners in general, and as a branch of that business had taken up agency in the Court of Session. When they did so the old expression "clerk to the Signet" became somewhat inappropriate, and they consequently took the name that was in general use, viz. "writer," and added to it the words "to the Signet," and so blossomed into W.S. The other writers who were practising before the Court as agents had a hard time of it. They were always being shouldered out by the

W.S. or some other person, and had to make a stout fight for it. They at last, in the year 1797, obtained a royal charter incorporating them and giving them a legal standing. They could not conveniently take a name embracing the word "writer," as the Clerks to the Signet had forestalled them. They had therefore to cast about for another, and no happy mortal having suggested "law agent," they hit upon "solicitor," and became Solicitors before the Supreme Court. They took this name very much, however, to show that they had nothing to do with the rather supercilious Writers to the Signet, who had persecuted them many years before, and continued to do so for many years after this time. That was the way that solicitor was first used in this country. Of course there was the word "attorney," but this was not open to them, as the old Court of Exchequer was still in existence, and when that institution was imported from the South they had not only barons and chief barons, but a "clerk of the pipe," and full-fledged attorneys. This was why their friends became solicitors and not attorneys. Fifteen years after the solicitors-at-law had their charter, the procurators got theirs. Their predecessors would have nothing to do with the term "solicitor;" they called themselves by the old name "procurator." On all these grounds there was, he held, no cause whatever to alter the old and well-known designation, and so far from solicitor being a word generally understood, very few in country districts knew what it was. He accordingly moved a negative to Mr. Fleming's motion.

Mr. Lauchlan Cowan seconded the amendment.

The amendment was carried by a considerable majority.

Afterwards, on the motion of Mr. James Mackenzie, a committee was appointed to consider the propriety of members of the Faculty adopting some special name or initials to distinguish them from other members of the profession not belonging to the Faculty.

The Scottish Law Magazine and Sheriff Court Reporter.

SMALL-DEBT COURT OF CAITHNESS.

Sheriff HARPER.

BREMNER v. GUNN.

Burgh Customs—Right to levy—Usage—Exaction.—The pursuer, John Bremner, tacksman of the burgh customs of the Royal Burgh of Wick, sued Donald Gunn, merchant, Wick, for customs on potatoes imported into Wick from a neighbouring county. The tacksman of the burgh customs had been in the habit of levying customs on potatoes coming

into the burgh from within the county of Caithness and receiving payment thereof, but he never received payment of customs on potatoes coming from a district outwith the county of Caithness. "Potatoes" were contained in the Table of Burgh Customs since 1835.

The following judgment was pronounced by Sheriff Harper at Wick:—

"In this case the tacksman of the burgh customs sues for payment of custom on a quantity of potatoes brought into the burgh by land from Ross-shire; and the defence is that the custom demanded is not exigible; that the magistrates never had right to levy such custom; and further, that if they ever had the right, they have lost it through failure to exact the custom.

"The claim to the custom is rested upon the Burgh Charter of 1589, and subsequent usage, or, as this usage is expressed in the Table of Customs published by the magistrates, the practice of the burgh; and the facts are that the magistrates are entitled under the charter to charge, levy, receive, and collect customs and dues, and apply them for the public good of the burgh; and that in the Table of Customs referred to, which is published annually, the import upon potatoes has appeared since 1835,

"Now I take it to be fixed law that where there is a question as to the extent of the power of a corporation to levy custom under a charter or other title, the exaction of the custom will be supported by immemorial usage or practice. In the case of Oliphant, for example, in 1775, it was decided that 'immemorial practice in a burgh of levying particular duties, having a preceding title in writing to tolls and customs in general, is a sufficient ground for the exaction.' And again, in the case of the Earl of Aboyne against the Magistrates of Edinburgh, it was held that 'immemorial possession and practice, where there is any dubiety in the words of a grant as not being sufficiently comprehensive, become the rule for exacting.' And the principle is exemplified and confirmed in a number of other cases, which I need not more particularly refer to.

"Further, usage, possession, or practice for forty years is held to be immemorial in cases of this kind. In that of the Magistrates of Linlithgow, in 1845, it was found in law that certain charters gave a sufficient title to levy customs, if so explained and supported by usage; and it was found in fact that the pursuers had been in practice to levy customs from time immemorial, or at least for forty years; and judgment was for the pursuers. And in the earlier case of the Magistrates of Lauder, in 1754, it was found that custom having been exacted for forty years, the magistrates were entitled to continue to exact it, the ground of their right being a general clause in an old Royal Charter; and among later cases on the same point I may refer to that of Raitt against the Magistrates of Aberdeen in 1804.

"The defender here says, however, that the right, if it ever existed, to exact the custom, has been lost by non-usage of it for forty years. I think the defender is wrong in this contention. It is really the right of the magistrates, the pursuer's author, that is here in question; and although the monies may not have been actually lifted or exacted by the tacksmen, the magistrates have sufficiently claimed and used their right since 1835 to levy the impost by granting publicly to their tacksmen the right to do so, and by publicly making known and asserting their right year by year in their published Table of Customs, thereby further certify-

ing the public that the impost was exigible, and that the tacksman had warrant to exact it.

"It is no objection that potatoes were not known in the country at the date of the charter, and therefore could not have been contemplated as one of the articles upon which the custom was to be levied. This was pleaded in the Glasgow case referred to in the debate; and there it was found that the magistrates were entitled to levy customs on potatoes although that article was not known in this country when the Royal Charter under which it was sought to levy the custom was granted. The case of Hill against the Magistrates of Edinburgh may also be referred to on this point.

"I rest this judgment on the charter and usage. The charter is very general in its terms. It confers power to levy customs, but mentions no articles upon which customs may be levied; and whether, apart from usage, the terms of the charter would support the present claim it is not necessary to consider.

"I desire to add that had I had any doubt in the case, inasmuch as a question of burgh right is raised, I should not have pronounced any judgment without affording to the magistrates an opportunity of appearing for the burgh interests. And it is hardly necessary to add further, that this judgment is in no sense declaratory, and that it decides only this individual case.

"I give decree for the pursuer."

Act. R. S. W. Leith, solicitor, Wick—*Alt.* Hector Sutherland, solicitor, Wick.

SHERIFF COURT, GLASGOW.

13th March 1884.

Sheriff MAIR.

M'LACHLAN v. MACDONALD.

Friendly Societies Act—Arbitration—Jurisdiction.—The pursuer in this action sued Mr. Macdonald, the secretary for and on behalf of the Pride of Dennistoun Lodge (No. 1822), being a branch of the Loyal Order of Ancient Shepherds (Ashton Unity) Friendly Society, and of the City of Glasgow District Branch of the same, registered under the Friendly Societies Act, 1875, for the sum of £10, being the amount of benefit due to him by the lodge as a member thereof, under the rules of the society, in respect of the death of his wife, Ann M'Lachlan, which happened on 11th December 1883. The claim was disputed by the lodge on the ground that at the date of the pursuer's wife's death he was out of benefit, and was therefore not entitled to the sum claimed. But it was maintained for the defender that the jurisdiction of the Court was excluded by the rules of the society, and that by the rules all disputes between the society and any of its members fell to be settled by arbitration as therein provided. Reference was made to section 22 of the Friendly Societies Act, 1875, by which it was provided that every dispute between a member or person claiming through a member, or under the rules of a registered society, and the society or an officer thereof, shall be decided in manner directed by the rules of the society, and the decision so made

shall be binding and conclusive on all parties without appeal, and shall not be removable into any Court of law. The pursuer, however, contended that the Court had jurisdiction to entertain the claim, as by sub-section 10 of section 30 of the same Act it was enacted that "in all disputes between a society and any member or person insured, or any person claiming through a member or person insured, or under the rules, such member or person may, notwithstanding any provisions of the rules of such society to the contrary, apply to the County Court, or to the Court of Summary Jurisdiction for the place where such member or other person resides, and such Court may settle such dispute." It was stated for the defender that the case was regarded by the society as an important one, as the effect of the pursuer's contention would be to set at nought their rules as to the settlement of disputes.

Sheriff Mair in chambers delivered judgment. He said his opinion was that the action was incompetent, and that the pursuer was bound to submit his claim to arbitration in terms of the rules of the society. By the rules of the Pride of Dennistoun Lodge, under the head of "Settlement of Disputes," it was expressly provided that such disputes should be settled pursuant to the district and general rules of the society as though these rules were therein inserted. It was unnecessary to refer in detail to the district and general rules; it was sufficient to say that ample provision was made in them for the appointment of arbitrators and for appeals against their decisions to meetings of the lodge or district meetings. The pursuer was a member of the Pride of Dennistoun Lodge, and by the rules of that lodge the whole of the rules of the district and general rules are binding upon its members. There was nothing illegal and incompetent in them. If a person joined a society and the rules provided the way and manner in which disputes between members and the society were to be determined, he was bound by these rules, and he was not entitled to ignore them and appeal to the ordinary tribunals of the country. These rules were part of the contract between him and the society. But it was said that, under section 30 of the Friendly Societies Act, a member of a society was entitled, "notwithstanding any provisions of the rules of such society to the contrary," to apply to the County Court or to a Court of Summary Jurisdiction for the settlement of his dispute. His Lordship said that at the debate he was very much struck with this section of the Act, as it seemed not only destructive of the rules of the society, but also contradictory of section 22 of the same statute, which provided that every dispute between a member and the society should be decided in manner directed by the rules of the society, and that the decision so made should be binding and conclusive, without appeal. After a careful consideration, however, of the whole statute, he was satisfied that the clauses were not contradictory, and that while section 22 applied to such a society as the Loyal Order of Ancient Shepherds, section 30 did not apply to it. Section 22, which was headed "Settlement of Disputes," followed a number of provisions in the statute relating to friendly societies in their common acceptance; while section 30, which was headed "Societies in Different Counties," applied to what were known as "collecting societies," or, as it was put in the rubric or margin, "societies receiving contributions by collectors." These collecting societies were placed on a different footing from ordinary or purely friendly

societies. Why this should be so, his Lordship did not pretend to say. A learned commentator on the Act, quoting from the report of the Government Commissioners on Friendly Societies, says—"That to the great majority of members the collector is the sole embodiment of the society." Probably, therefore, the Legislature considered it would not be expedient in the case of these societies to exclude a Court of law from dealing with any disputes which might arise between themselves and their members. He was accordingly of opinion in the present case that the jurisdiction of the Court was excluded, and that the pursuer must, in conformity with the rules of the society, submit his claim or dispute to arbitration.

Act. Wark, of Messrs. J. M. & J. H. Robertson—*Alt.* Fyfe, of Messrs. Wilson, Caldwell, & Fyfe.

SHERIFF COURT, GLASGOW.

13th March 1884.

Sheriff MAIR.

M. P. LECKIE WATSON AND CO. v. DUNN AND OTHERS.

Cessio Acts—Arrestment—Competition.—This was a multiplepointing case, in which the fund *in medio*, £4, 6s. 8d., was claimed by Robert Tosh, accountant, Glasgow, trustee for behoof of the creditors of William Archibald Dunn, the common debtor, under a decree of *cessio bonorum* in his favour, dated 12th December 1883, and by Robert Hunter, portioner, Cumberland Street, Glasgow, a creditor of the common debtor, and who, in virtue of a decree against him for £160, dated 11th and 18th September 1883, had used arrestments in the hands of Leckie, Watson, & Co., the holders of the fund *in medio*, on 14th and 28th December 1883. The question raised was, Which of these parties was entitled to the fund *in medio*?

Sheriff Mair, in delivering judgment, stated that it was maintained by the arresting creditor that he was entitled to the fund *in medio* on the ground that he had attached the fund, while no steps had been taken by the trustee in the *cessio*, either by arrestment or by intimation of the decree of *cessio* to the holder of the fund, and that a decree of *cessio* was no better than an assignation by the common debtor, which, without intimation, was incomplete and ineffectual as in competition with an arrestment. His Lordship, however, was of opinion that this argument was not well founded, and proceeded on a misconception of the character and effect of a decree of *cessio*. In the present case the decree of *cessio* was prior in date to the arrestment. The object of a *cessio* was to hand over the whole estate of an insolvent to a trustee for equal distribution among his creditors. Under the *Cessio Act* of 1836 the application was made by the insolvent himself; and before obtaining decree he required to satisfy the Court that his insolvency had arisen not from fraud but from innocent losses and misfortunes. By section 16 of that Act, the decree granting the benefit of *cessio bonorum* was declared to operate as an assignation of the debtor's moveables in favour of any trustee mentioned in the decree for behoof of the creditors. The assignation was thus a judicial and statutory act, and required no intimation, and the trustee

was appointed to distribute the estate equally among all having claims upon it. The insolvent was thus divested of his estate, just as much as he would under the operation of the Bankruptcy Act of 1856. After decree of cessio, the creditors, at least those of them who have been called in the process, had no right to interfere with the estate, which had devolved upon the trustee for their general behoof. By being called in the action they had it in their power to object, on cause shown, to their debtor getting the benefit of cessio, but, once the decree was pronounced, the effect was to transfer the estate for equal distribution among them all. The trustee named in the decree did not represent the debtor. He held the estate for the creditors themselves in their just proportions. He was their debtor, but not for the general payment of the original debt, but only for the amount of the debt which might be afforded by the realization of the trust effects. In these circumstances no diligence by an individual creditor could confer a preference, because such preference must necessarily infringe on the equal rights of the other creditors indefeasibly vested in them by the operation of the decree of cessio. Accordingly Professor Bell, in his Commentaries, laid it down (7th edition, vol. 2, p. 485) that "no individual creditor can take separate proceedings to raise for himself a preference subsequently to the disposition *omnium bonorum*." The recent Cessio Acts of 1880, 1881, and 1882 did not in any way alter or affect the provisions of the Act of 1836, so far as the effect of the decree of cessio was concerned. If effect was given to the contention of the arresting creditor in the present case, the result would be to set at nought the beneficial provisions of the whole of the Cessio Acts, and to deprive the creditors of that which was intended, namely, an equal distribution of the estate among them. His Lordship therefore sustained the claim of Mr. Tosh, the trustee, to the fund *in medio*.

THE JOURNAL OF JURISPRUDENCE.

CONCERNING A CODE OF COMMERCIAL LAW.¹

BY SHERIFF DOVE WILSON, LL.D.

IN a recent work by Professor Max Müller upon India, he has incidentally occasion to speak of the "burning questions of the day," and he gives them in the following order:—Popular Education, Higher Education, Parliamentary Representation, Codification of Laws, Finance, Emigration, and Poor Law. On first reading this, I was surprised at the place assigned to codification. Although I knew that some considered codification a question now falling within the sphere of practical politics, it would not have occurred to me either to have called it a "burning question," or to have assigned it a place in importance next to Parliamentary Representation. When I came to remember that the distinguished Professor was not by origin a British subject, but was both from his origin and his subsequent pursuits as familiar with what occurs on the Continent of Europe as with what occurs in this country, the place he assigned to codification was explained. All over Europe, in the course of the present century, codification has been an object of the greatest attention from statesmen, and of immense labour from professional lawyers, and it is natural enough that, by one whose standpoint is high, it should be called one of the burning questions of the day.

Before entering upon the question of the codification of the commercial law of the United Kingdom, I shall ask your attention for a short time to what has been done in the way of codifying the commercial laws of other countries, but before entering upon the subject at all, it would be well to settle what it is that we exactly mean by a code. Codification has nothing to do with the amending of the substance of the law. It affects the substance indirectly only. Codification is an amending of the

¹ The following paper consists of an address which was delivered by request to the Chamber of Commerce of Aberdeen on 23rd April 1884.

form of the law. It has for its object the reduction of ill-written, or of unwritten law, into well-written law. This age has been called the age of handbooks, and a code is a handbook of the law of the best kind. A code is an authoritative statement of the whole existing law upon any particular subject, presented in its simplest form. A code, in the first place, is an authoritative statement. It differs in this from ordinary handbooks, which lie always under the necessity of occupying space by indicating the reasons for what they set forth, and by discussing doubtful points. Then, in the next place, a code contains within its four corners the whole law upon its subject. With uncoded laws, any one desiring to know the whole law upon any particular subject has to read the statutes, the decisions, and the so-called institutional writers; and then he has to inquire whether there may not also be some unwritten law upon the subject. The last characteristic of a code is that it gives the law in its simplest form. When the law has to be extracted from uncoded materials, it is found to contain many blanks, to be overloaded with repetitions, and to be full of ambiguities. The result of setting forth the law in a code in its simplest form, is that it is complete, concise, and easily intelligible. The arrangement of matter in a code is logical, following not the order in which the law happens to have grown up, but what I may call the natural order of the events occurring in the transactions with which it deals. A code also abjures those words in dead or foreign languages which swarm in uncoded laws, and it never uses technical language when ordinary will suffice. The theory of codification is that it is worth while to take some trouble, in order that those persons whose affairs are to be regulated by the law, should, if it be in any way practicable, have some idea of its provisions.

The meaning now attached to the word "code" excludes from our view all the earlier attempts at codification. The famous code of Justinian we should now describe as a collection of the materials necessary to form a code. The codes of the early and the collections of laws of the later middle ages fall, for other reasons, equally beyond the scope of the modern definition. The true precursors of the modern code are the commercial and maritime "Ordonnances," prepared in the reign of Louis XIV. by his distinguished finance minister Colbert, and the code of General Law, which Frederick the Great brought into force in Prussia. But all the older codes were partial and incomplete compared with the first of the great modern codes. The first of these is the one carried through by the energy of Napoleon Buonaparte. He divided the whole law dealing with the relations of private individuals into two parts, embodied respectively in the "Code Civil" and the "Code de Commerce." The latter—founded on the work of Colbert—came into force in 1808. It is divided into four books. The first treats of commerce in general, containing

titles upon merchants and their books, the law of partnership, brokerage, principal and agent, sale, bills of exchange, and the other different commercial contracts; the second book deals with maritime commerce; the third, with bankruptcy; and the fourth, with jurisdiction in commercial disputes. It goes over a greater field than is now thought necessary to a commercial code—the law of bankruptcy and questions of jurisdiction being better treated separately; and, although the excellence of its arrangements in other respects and the lucidity of its language were conspicuous merits, it failed somewhat from the haste with which it was prepared. It is greatly wanting in the matter of definitions, and in many cases in not entering sufficiently into detail, but it is the law which, nevertheless (with some comparatively unimportant additions), still regulates commercial matters in France, and it has been widely copied in the rest of the world. It came into force in Belgium, when it was passed, and in recent years it has been there subjected to a careful revision. In 1830 it was adopted by Spain, and soon after extended to its colonies. Portugal adopted it in 1833, Greece in 1835, and Holland in 1838. At various other times it has been adopted, either as a whole or in substance, in Russia, Poland, Turkey, and Roumania. On the other side of the Atlantic it is in force in most of the South and Central American States.

Since the time of Napoleon, however, great progress has been made in the art of codification. The subsequent codes of Germany, Italy, and Switzerland show great improvements. The commercial code of the German Empire is divided into three parts—viz. the code of bills of exchange, the code of maritime law, and the code which contains the remaining portions of the commercial law. The bills code had been adopted in particular States of Germany some time before the Revolutions of 1848, but its adoption for the whole German Confederation was one of the few successful Acts of the short-lived Government of that year. The codification of the rest of the commercial law was then resolved upon, but nothing was done till 1856, when the Confederation appointed a Commission, which took up the matter in two divisions. The Commission for maritime law sat at Hamburg, and that for the remainder of the commercial law at Nuremberg. Their work was completed in 1861. It was the subject of the greatest care; and all the juridical learning, of which Germany has so much at its disposal, was freely given to it. It is a code which is much more complete in every respect, both practical and scientific, than the original Code Napoléon, and indeed its obligations to its predecessor are comparatively small. The arrangement differs considerably. Bankruptcy and jurisdiction are left to be dealt with elsewhere; and the first book of the French code is split up into four, thus enabling a much fuller consideration to be given to the different commercial contracts.

There is also less vagueness in the language—the definitions being more precise, and the fault of over-conciseness being avoided. The German language, however, is a clumsy and involved contrivance as compared with the French, and the precision of the German code is laboured, and lacks the elegant clearness of its predecessor. On the completion of the German code in 1861, it was adopted by Prussia, and shortly afterwards by Austria. By 1870, when the German Empire superseded the German Confederation, it had been adopted by all save one or two small States. In 1870 it became one of the laws of the Empire, and since that date it has been in full vigour over the vast regions, and through the dense populations where the German Emperor's authority is recognised.

The commercial code for Italy was first brought into force in 1865, that is, within a very few years of Italy having come to form a single kingdom. The code was mainly founded on the French, which had been previously in force in some of the individual Italian States. The code issued in 1865 was avowedly temporary. The commission charged with the preparation of the permanent work was formed in 1869, and continued its labours till 1877, when the draft was presented. It took three years to go through the Senate, and nearly other two years to go through the Chamber of Deputies. After passing those bodies it was returned with their amendments to the Commission that the whole text might be revised so as to see that it contained no inharmonious provisions and no sources of confusion. This revision was completed in 1882, and then the code was adopted *en bloc*. It came into force on 1st January 1883. The foundation is the Code Napoléon; but large assistance has been obtained from the German code. It may be described as a new edition of the French code brought up to date. It is much fuller in its treatment of the various contracts, and it increases considerably the number treated. It includes commercial transactions in "immovable" property, that is, in what the English call "real" and we "heritable" property. It regulates the powers of the State, of the provincial governments, and of the city corporations to take part in commercial transactions. It gives also much more prominence to those contracts which, being entered into between residents of different countries, have something international in their character. It deals more fully with partnership, and gives prominence to the contract of carriage by land, which in the old French code was miserably incomplete. It treats of all forms of insurance—fire, life, and marine—and contains other improvements needless to mention. In point of arrangement of matter and clearness of expression, the code does honour to a country whose writers are masters of logical treatment, and who have the good fortune to use a language as excellent for scientific accuracy as it is famous for poetic beauty.

The last of the great modern commercial codes is that for

Switzerland. The first serious attempts to form a Swiss code date also from the disturbances of 1848. The necessity for a commercial code in Switzerland was perhaps greater than elsewhere, as there were within a very small space some twenty-four cantons, each asserting its right to deal with commercial law according to its own good pleasure. The only way, however, till recently, by which the evils thus occasioned could be remedied was by the agreement of the different cantonal legislatures upon the same code. This way of proceeding was known as the proceeding by way of *concordat*. After nearly twenty years' work on it the result was that they had got no further than the law of bills of exchange, and that some of the cantons had adopted the French, some the German, and some a code which was neither the one nor the other. It was seen that any attempt to deal with the whole commercial law in this way would fail; and accordingly, in 1874, an alteration was made on the Swiss Constitution, and power was given to the Central Government at Berne to make a code of commercial law. This code was recently completed. The Commission charged with it was appointed in 1875, and sat till 1881. The labour of the Commission was incessant. It began with a draft which had been formerly prepared with a view to adoption by *concordat*. This it thoroughly revised, and afterwards no fewer than three successive editions were issued before the final text was adopted. This was laid before the Legislature in 1879, and was finally passed in 1881. The Swiss code receives the name of a "Code of the Law of Obligations," but substantially it is a commercial code. It has two texts, the one in French and the other in German, both of equal authority. It follows the order of the German rather than that of the French code, but is in reality an improvement on both. In many respects, both in its treatment of the general law of contracts, and in its treatment of particular contracts, such as sale, it shows a decided advance; and were we to confine ourselves to the imitation of any particular code, the Swiss code, both in its mode of preparation and in its results, would certainly be the best for our purpose.¹

From this short notice of the French, German, Italian, and Swiss codes, it will be seen how much has been done in the rest of Europe, while we have been doing little or nothing. In Europe, codification has been truly a burning question. It will have been noticed also that its field has extended from Europe over the whole

¹Most of the information here given has been taken from the respective codes themselves, which, with introductions and indices, are all published in convenient pocket volumes. The facts as to the history of the French code are accessible in many sources, but I have here taken what I required from vol. i. of Thöls *Handelsrecht* (sixth edition, Leipzig 1879). From the same source I have taken the history of the German code. Concerning the Italian code, I have used the Official Report of the Minister who presented it, and the "*Diritto Commerciale Italiano*" of Professor Marghieri (Naples 1882); and concerning the Swiss code, "*Das Schweizerische Obligationenrecht mit Allgemeinfasslichen Erläuterungen*" of Professors Schneider and Fick (second edition, Zurich 1883).

civilised world, with the important exception always of the parts inhabited by the Anglo-Saxon race. In codification, it is Great Britain and its Colonies and the United States of America which are not to the front. In the latter great progress has, however, been made in the codification of many branches of the law, though hitherto nothing has been done towards making a commercial code. The cause of this is probably much the same as that which so long impeded codification in Switzerland. In the United States what has been codified has been the laws of the individual States by their separate Legislatures; and probably in America there will be no code of the commercial law till power is given to the Government at Washington to frame one. But in the United Kingdom and its Colonies we have hitherto done almost nothing at all in the way of codification. In this matter we occupy the position—which is always one of some distinction—of being behind every other civilised nation.

There are lawyers who will tell you that it is unnecessary to do anything, and that the rest of the world, in running after codification, have been wasting their time. They ask you to believe that the labour which statesmen and jurists have so persistently given in other countries to reducing their laws to their simplest form has been thrown away. If you ask the inhabitants of those countries you will get a different answer. They will tell you that many advantages have accrued from codification, and that, in particular, commercial codes have greatly facilitated business and diminished litigation. They are proud of their codes, and so content with them that, so far as I know, there has never been a hint at any nation which had got a code going back to the old uncoded laws. It may be said that we cannot require a code, our commerce having without one attained proportions greater than the commerce of any other country. It may freely be admitted that no other country has a commerce like that of the United Kingdom, but it must be the most illogical of heads that can trace any connection between an extensive trade and a confused collection of laws; and though foreigners may not have such a vast trade as ours, still Hamburg, Antwerp, Marseilles, and Trieste are by no means cities of the dead, and the transactions there are surely extensive enough to enable the merchants to judge whether they have gained or lost by codification. The objection that codification cramps the law and prevents the introduction of necessary amendments is quite unfounded. In codes there is as free and ample a recognition of the customs of merchants as there is in uncoded laws; and though there certainly was once an idea entertained that a code was to be the end of all future legislation, it is now recognised that no code can pretend to be final. The law laid down in a code is subject to development by the course of decisions, and to alterations and corrections from time to time by the course of legislation; but whether for the one purpose or

the other the clear and distinct provisions of a code are, as a commencement, infinitely preferable to the uncertain sound given by uncoded laws.

I cannot imagine any intelligent person disputing that the laws of Great Britain are in a condition eminently requiring codification. Any one who knows the bulk to which the statutes extend, the innumerable and ever-increasing volumes of decisions, and how obscure and contradictory these sources often are, must admit that the reduction of them to a code would be of the greatest benefit. Even the professional jurist, with all the skilled appliances he can command, has difficulty in attaining any clear idea of the whole law upon any particular subject, and room is left for an enormous amount of litigation. Where laws are reasonably distinct, there ought seldom to be litigation, except where facts are in dispute; but it is a matter of everyday knowledge that tedious litigations are still conducted in this country over the first principles of commercial law. It is hardly possible, without seeming to exaggerate, to show the expense of settling principles by litigation. If you take any ordinary legal treatise—say Benjamin on Sale—there are single lines in it which must have cost hundreds of pounds to settle. According to foreign experience, the great bulk of such litigation has been unnecessary. No doubt the cost of a code would be something, but it would be inconsiderable compared with the amount we spend on avoidable litigation, and it would fall upon the nation at large and not upon the individuals who are unfortunate enough to be victims of a legal ambiguity.

It has been said that it is impracticable to frame a commercial code for the United Kingdom. It has been said that the differences between the laws of England and Scotland are too radical to be overcome, and that our law is so enormously complicated that no skill could present it in a simple form.

It is a complete misapprehension to represent the differences between Scotch and English commercial law as radical. There are many branches of our laws of which that remark might truly be made, but the commercial laws of both countries come from the same source. Both come from what is known as the Law Merchant, which was founded upon the customs of merchants in force throughout Europe. In commercial law the judges of all countries have always endeavoured to rise above merely local considerations, and so to regulate their decisions that the scope of commerce between nations might not be checked. The commercial law of England and Scotland is thus substantially the same. The principal differences which had crept in were removed in 1856; and—though there are still many differences in outward appearance, caused by the different sources from which our respective laws upon other points have come—in all the leading provisions, Scotch and English commercial law is identical, and in our courts English decisions on it are of almost equal authority

with our own. The differences among the various old provinces of France; between north and south Germany; and between French and German Switzerland, as regards commercial law, were vastly greater than anything which our code-makers would have to encounter.

The objection that the mass of our law is too extensive for codification loses all force the moment it is examined. It may be admitted that the number of decisions in the United Kingdom has been so great that the commercial law of this country is more fully developed and goes more into detail than that of any other country; but the convenient exposition of details is only a question of time and of patient arrangement. With a good logical order to follow, with proper subdivision, proper tables of contents, and proper indices, there is no reason in the world why even a very large collection of laws should not be as easy to consult as a small one. But the difference in extent between our commercial law and the foreign law is not nearly so great as people would have us believe. In the law of bills of exchange the number of precedents settled by our Courts is relatively quite as great as in any other branch of our law. But when the law of bills of exchange came recently to be codified, the British code was neither greatly larger than the codes of other countries, nor large in itself. It is perhaps twice the bulk of the Italian code of bills, and is somewhat larger than the German code. Nevertheless the whole of it is contained in less than forty moderately-sized octavo pages; and though the code of the whole of our commercial law were to be proportionately as large, it would still form a very moderately-sized octavo volume. The fact that our law is well developed in detail is rather an encouragement for us to go on with its codification than the reverse. It supplies the strongest reason why we require codification, and as the substance of our law is sufficiently good, the probability is that the British code, although the last, might be the best of the codes of the civilised nations.

The best reply, however, to those who say that there cannot, and ought not to be, a commercial code for the United Kingdom, is that an important part of our commercial law has already been codified, that it has been well done, and that it promises to be of great public advantage. As you are aware, the law of bills of exchange was codified in 1882. The law of bills is a considerable portion of every commercial code. It forms about a tenth of the Italian code, about a sixth of the Swiss code, and about a fourth of the non-maritime portion of the German code. From what has been done in it, it is fair to judge what is practicable in other branches. A short notice, therefore, of the Bills code, and of how it came to embrace the United Kingdom, will not be out of place. That code differs from all other codes in being the work, not of a Government, but of private bodies. It was undertaken by the Bankers' Institute and by the Associated Chambers

of Commerce. When introduced into Parliament, it was applicable to England and Ireland only. When I saw it, it seemed to me that we had arrived at a turning-point. If the code of bills were to be allowed to pass with that limit, it would form a precedent for the other portions of the commercial code, and might have delayed for a generation the framing of a code for the United Kingdom. If the English got their law alone codified, the code would be certain to contain so many English peculiarities that the Scotch would be averse to adopt it, and the English, once their law was settled, would be unwilling to allow its revision so as to make it more generally applicable. Fortunately, the composition of the English draft code of bills was such as to involve, in its adaptation to Scotland, no serious difficulty. Its draftsman, Mr. M. D. Chalmers, had adopted an arrangement thoroughly logical and natural, and his language was throughout characterized by the greatest lucidity. The draft was a new departure for England, and compared in point of merit with the drafting of the best foreign codes. Happening myself to have an admissible claim to be heard upon the law of bills of exchange, and finding that, although the Bill had been two successive years before the House of Commons, no one else apparently was moving in the direction I thought desirable, I addressed myself to Sir John Lubbock, who had introduced the Bill, and I brought under his notice the desirability and practicability of extending it to Scotland. From Sir John Lubbock I received a favourable reply, and an inquiry whether I would be willing to give information as to the points on which the Bill, as introduced, might require modification. At the same time he obtained for the Select Committee, to which the Bill had been remitted, the assistance of the Solicitor-General for Scotland, and of some Scotch members skilled in commercial affairs. After I had replied to Sir John Lubbock, stating my willingness to give the assistance required, I had a communication from Sir Farrer Herschell, the chairman of the Select Committee, detailing the form in which the information was wished. In consequence of that request I prepared for the Committee a report, consisting of two parts. In the first, I explained generally the various differences between the English and the Scotch laws of bills, and, in the second, I went over each clause of the draft, and pointed out the respects in which it would require modification. That report was a somewhat lengthy document, filling several pages of folio print, and it contained, for the information of the Committee, some notes as to the provisions of the French and German laws on these points on which the English and the Scotch differed. The report was circulated amongst the Committee, and I was examined before them. The Committee had no difficulty in coming to the conclusion that the application of the code to the United Kingdom was both desirable and practicable. The amendments necessary for that purpose were drafted by the

Solicitor-General for Scotland, and in that work, I may add, he had what assistance I could give him. The result was a code applicable to the United Kingdom. I may say that, even as far as England was concerned, the revision, so as to include Scotland, was a benefit, because a few more English technical terms were got quit of, and some few improvements on the substance of its law were made. The Select Committee, when they found any point of difference between the law of England and Scotland, directed themselves with impartiality to determining which was most in keeping with the general custom of merchants, and would be best for commerce. The result of their labours was so successful that there now remains only one point on which it was found that the English and Scotch laws could not be reconciled, and that is a point of no very great importance, as it can come into force only in the case of a bankruptcy. There are, it is true, three specially Scotch clauses in the code, but one of these deals only with the matter of holidays, which, for ecclesiastical reasons, could not be the same in both countries; and another is a valuable addition to the proper field of the Bill, made upon the recommendation of Lord Shand, with the view of rendering the law of evidence upon bills in Scotland more equitable and more in accordance with the law of England. The only Scotch clause in the code which really represents a difference with the law of England is that which deals with the effect of a bill when presented for acceptance in constituting an assignment of the drawer's funds in the drawee's hands.¹

The period during which the Bills code has been in force—some eighteen months—is perhaps too short to found a final opinion upon, but the difference between the amount of litigation on bills before the code and that since is so great as to be scarcely capable of explanation in any way except by the influence of the code itself. I have taken ten recent years of the professionally reported cases on the law of bills in England and in Scotland immediately prior to the code, and as cases are only reported for the profession when questions of law are involved, those reported cases are necessarily all litigations upon the law of bills. I find that in the ten years there were just 101 reported cases in the Supreme Courts of England and Scotland on the law of bills, giving an average of ten cases in the year. During the year which immediately followed the passing of the code I find that there were in all four reported cases, and in the half-year which has since elapsed I find that there are three reported cases on the law of bills.² These figures show a very material diminution, but

¹ 45 and 46 Vict. c. 61, § 53 (2) and 100; also, § 14 (b), when read in connection with the Bank Holidays Acts referred to in it.

² The ten Scotch years here mentioned are those from 1867 to 1877, which are given in the continuation of the Digest of Messrs. Beaton Bell and Lamond. The ten English years are those contained in the Law Journal Digests for 1870 to 1875 and for 1875 to 1880. I took those years because I could conveniently get the

when the cases that have been decided since the code are analysed, their import becomes more significant. Out of the seven cases reported since the code, I find that five are cases under the old law, which had been continued in the Courts of Appeal from dates prior to the passing of the code. I find also that of the remaining two one arose upon the law of prescription, and the other upon the law of process on bills of exchange—branches not included in the code. It is certainly a very curious circumstance that during the eighteen months since the Bills of Exchange Code was passed, there has not come before the Supreme Courts of England or Scotland a disputed case as to the legal effect of any bill of exchange. There has been ample time for such cases, because disputes about bills come quickly to the front, and there have been, doubtless, cases enough upon them in which questions of fact were in issue. In the local Courts, where—in Scotland at least—the mass of litigation on bills always occurs, there has probably been a proportional diminution, though probably there is not the same entire absence of such cases, as the whole number of cases in the local Courts on bills is much larger, and points are sometimes argued in them which would not be raised in the higher Courts. The effect of making the law of bills definite, and making it readily accessible to those concerned in it, has already shown itself, and I say that what we have done in codifying the law of bills of exchange is the greatest encouragement we could possibly have for going on to codify the rest of the commercial law.

A complete commercial code should in theory contain all provisions of the law relating to both the production and distribution of articles of wealth. It is found impossible to make it so extensive. Some of the laws affecting the production of wealth, such as the Factory Acts, and some of the laws regulating its distribution, such as the Merchant Shipping Acts, deal very much with details of an administrative character which are liable to change from time to time, and are therefore better embodied in separate enactments. Excluding, therefore, from the code everything of that kind, we find, nevertheless, a very extensive field for it. A commercial code would, in the first place, deal generally with the forms for contracting, assigning, and discharging commercial contracts. In the next place it would deal specially with the law of sale, of principal and agent, of principal and surety, of partnership, of employer and employee, of the letting and hiring subjects (including immovables) used in commerce, and with all other commercial contracts. The law as to carriers, by sea and land, and as to insurance—fire, life, and marine—would, of course, be included. It would end with the law as to

figures for them. The figures for the period since the passing of the Bills code have been taken, for England, from the Law Journal Reports, and for Scotland, from the Session Reports (fourth series), so far as published, and subsequently from the Scottish Law Reporter.

the prescription or limitation of commercial obligations. The law of banking and of currency having a department for itself, and the law of bankruptcy being better treated separately, would not be included.

Supposing such a code to be desirable and possible, the practical question arises, how are we to set about getting it? I accepted with alacrity the invitation of a Chamber of Commerce to address its members on this subject. It depends altogether upon the merchants of Great Britain whether and when the commercial law is to be codified. The merchants are mainly interested in the question; they can understand it and recognise its importance; and they have sufficient political power to carry out their wishes. It is therefore for them to move if they desire a code. If they wait till others move, they may wait long enough. I would not like to say how long they may have to wait, if they wait till the lawyers take it up. It is not many years since the project would have encountered strong opposition from the legal profession. Now it will not be opposed, and it will even find active support from some of the most eminent and accomplished members of the body, but it is too much to expect that lawyers will of their own motion take up and carry through a reform, the first effects of which will be to popularize their special knowledge, and probably somewhat to diminish their profits. I believe lawyers will have public spirit enough not to let their interests stand in the way of a public improvement, and more cannot be asked from them. They cannot be expected to urge the reform, if those whom it will benefit make no sign. In this country it cannot be expected that statesmen are to take the initiative. In other countries, statesmen often act in advance of public opinion, but our free representative institutions compel statesmen to wait until public opinion is ripe for action. I apprehend, however, that there is no statesman who will not give the most cordial support to a proposal for a commercial code if it is urged upon him by the voice of the mercantile community.

It may be said that the time is not opportune, there being too many other "burning questions" in the field. I would submit that no time could be found more convenient. As Professor Max Müller pointed out, this question comes in importance immediately after the representation of the people. That question is being solved now, and when it is solved the time will have come for a code to be enacted; but while that question is being solved, and our public men are discussing it, there is no reason why the Commission for codification should not be working. It would not occupy much of the time of the Government to issue a Commission for the codification of the commercial law. That Commission would probably take a few years to draft the code and ripen it for legislation, and by the time the draft was ready, Parliament would be open for its being enacted into law. You may depend

upon it that you will not find any time more convenient than the present for bringing forward your request for a Commission. I am taking it for granted that so great a work as the codification of the whole commercial law could be done in no other way than by a Government Commission. The fact that the Government has failed to pass its criminal codes is no reason why we should not go on with the commercial code. As these criminal codes, after all the labour that was spent on them, were not applicable to the United Kingdom, I for one do not regret their loss. But they raised matters of contention, and were beset with difficulties which a commercial code would not encounter. The failure of the Partnership code to get a hearing is only an instance of the mistake of mixing up with codification other law reforms, however good in themselves, and of supposing that private bodies, however influential, can always be relied on for doing what is properly Government work. In asking for the Commission I would respectfully ask permission to guard you against one error which some of the advocates of codification in this country have committed. They have asked too much. It is at present merely a dream to imagine a code of commercial law for the whole civilised world. The essential thing in the meantime, and the only practicable thing, is for each country to codify its own law. When the different States of the world have done so, it will be time to think of welding the various codes into one law. A code of commercial law for the United Kingdom would of itself go far towards solving the problem of the universal code; as it should form an integral part of our programme, that opportunity should be given to our colonies to join in our code so as, if possible, to make it a code for the British Empire.

Assuming then that you are satisfied that you are the parties to move, that this is a suitable time for moving, and that you have settled what you are to ask, there remains for consideration only the question how your project can best be carried out. On the Commission it would be necessary to have not only lawyers representing the different systems of the United Kingdom, but merchants. The codes being intended to be understood by merchants, it is well to take them along with the work from the commencement, and they are always able to give practical information as to the matters which require to be regulated. The Commission would have power to employ draftsmen and, where necessary, legal specialists to revise the draft. The code would be drawn first for England only, and would embody the existing law, and not any improved or amended system—the powers of the Commission as to improvements on the substance of the law being limited to suggestion. When drawn for England, it would probably suit Ireland. The fact of the code being drawn for England first would be no hindrance to its adaptation to Scotland. As I have already had occasion to point out, a necessary peculiarity

of a code is that it follows the natural order of the events occurring in the transactions with which it deals; and when so drawn, the arrangement is just as suitable for Scotland as for England. As soon as the code was drafted for England, it would be revised with a view to its adoption for Scotland, and each clause would be carefully gone over, so as to determine how to deal with the differences between the two systems. These differences would fall into classes—those which were apparent, and those which were real. The great bulk would be found to be in the former class, and it would be found that by mere changes of expression—such as the turning of a technical word into a word in ordinary use—the apparent differences would be eliminated. Where the differences were real, it would be necessary for the Commissioners to draft parallel clauses, the one showing the English law and the other showing the Scotch law. It would also be for them in such cases to make their suggestions as to the way of getting quit of the differences, either by assigning the preference to the one rule over the other, or by adopting some middle course. In this way the draft code would be completed. When it was completed it would be issued for the consideration of the public, and doubtless would be subjected to severe criticism. The bodies to whom it should be specially submitted would be the various courts of law and judges, the faculties of law in the Universities, the legal corporations, the city and county authorities, and the chambers of commerce. It should also at this time be communicated to the colonial governments, and their co-operation in its final revision invited. In framing most of the foreign codes, it has been the practice at this stage to submit the drafts to eminent jurists of other countries, and in that way valuable suggestions have been obtained. The reports of the different bodies and persons consulted having been obtained, the Commission would again revise its draft, and it might be expected that very material changes would be made. The first published draft of the Swiss code was changed from end to end in consequence of the suggestions which were made, and our Commission should not be slow to adopt improvements in whatever quarter they might originate. When the code had been revised it would be for the Commission to determine whether it should again be issued for further consideration to the different bodies concerned or be reported to Government. When the draft came ultimately before Parliament, it would be taken over in the usual course of procedure by a Grand Committee or by a Select Committee. Parliament alone should have power to make amendments on the law; but after its amendments had been introduced the code would require to be submitted again to the Commission for a thorough verbal revision. When returned from the Commission with this done, it would be ready for adoption *en bloc*.

I have certainly indicated a considerable amount of labour to

be gone through before a code of commercial law can be completed, but similar labours have been gone through elsewhere, and the talent and patience to undertake the toil can be amply found in our country. It is hardly safe to venture upon a prophecy as to the length of time the framing of the code might take, but I think that there should be comparatively little difficulty in accomplishing the whole within a period of five years. I need not say that if the code were made it would be one of the greatest legal monuments of its generation; that it would be a testimony to the enlightenment and public spirit of the merchants of this country, and in the next place to the talents and learning of our jurists. I certainly expect that the highest legal talent will be available for the making of the code, as I cannot but think that it is a mistaken view which in this country imagines that the settling of the terms of the law by Acts of Parliament is a matter comparatively easy or unimportant, properly enough left to laymen with little legal help, while the highest legal talent is only to be called in after inferior drafting has caused practical difficulties. I would bring in the best legal talent from the beginning, and I would assign as high honour to those who settled (in the code) legal principles in lucid language for the benefit of the whole community, as I would to those who settle them (in a suit) for the benefit of individuals. I can conceive no higher purpose to which legal talent can be devoted than that of placing the laws of the country in their clearest and most convenient form, so that those who have to obey them may understand them, and so that litigations, with all the ruin they may bring in their train, may, as far as possible, be avoided. It may be that there are greater reforms which can occupy the attention of public men, but a reform such as the one I advocate, which would facilitate commerce in this country, and ultimately throughout the world, is not one lightly to be delayed, for commerce is the handmaid of civilisation, and the furthering of it is the furthering of peace and goodwill among men.

THE "ORDINARY MACERS" OF THE COURT OF SESSION.—II.

(Continued from p. 300.)

THE Parliament of Scotland met for its last session in 1707, and although of course the principal and most engrossing business laid before it was the Act of Union, still necessarily at such an important juncture in the national history there were many little matters, themselves insignificant, but of deep interest to the persons concerned, which required to be cleared up and disposed of while its ancient power and prerogative still remained with the august assembly. Thus it has come about that we find the macers and their emoluments figuring in the narrative (alas, but too

incomplete!) of the proceedings of the Union Parliament. A clause was carried on the 17th of February 1707 "in favours of the Macers of Privy Council in these terms, Declairing that the Macers of Privy Council, who by their Gifts did attend and officiat before the said Commission of Parliament, shall continue to attend and officiat before the said Lords of Session in the matter committed to them by this Act, as they were in use to doe before the said Commission and none else." We gather that a division of opinion existed as to whether after the Union the judicial duties connected with what is termed the "Plantation of Kirks and Valuation of Teinds" should be entrusted to a Commission appointed by this last Parliament, or confided to the Lords of Council and Session. The majority in favour of the latter alternative carried their point, and at the second reading of the Act the clause above quoted was also carried. Accordingly, when we refer to the Act as finally "Touched with the Royall Scepter by Her Majestie's High Commissioner in the usuall manner" four days afterwards, the clause is found duly inserted. At this stage, therefore, it appears that the macers of Privy Council for the first time became absolutely officers in the Courts established for these ecclesiastical duties, without any other functions assigned to them, and were truly officers of a Court of Law, although distinct from the other Courts.

These macers in the Court of Teinds were really, when officiating before the Court, not acting as officers of a legal Court, but as officers of the ancient Parliament of Scotland; and the judges were sitting as a Commission of Parliament, in place of the former Commission that sat during the greater part of the seventeenth century. Accordingly, the Teind Court in that peculiar and special capacity continued long to have a distinct official staff of its own (see *Erskine Instit.* I. v. 22). In an old book called *Forms of Process*, dated 1791, and said to have been written by a Mr. Watson, the Act transferring these macers to the Teind Court is mentioned, and it is added that their number had by that time been reduced to two, "who are understood to be in the nomination of the Judges." Thus it is evident that at one time the number of these officers had been larger, and our inquiries were directed to ascertaining how many macers were transferred by the Act of 1707 to the newly constituted Teind Court from the Privy Council. We have found that, among the records of the Teind Office, there exists the original of a petition addressed to the Court by the macers of the Teind Court in 1708, and as the names of the macers are given as Robert Bannatyne, John Hog, and David Grahame, their number is ascertained to have been three. Incidentally it should be mentioned that evidently these appointments were openly bought and sold in those days, for the petition runs that "it is not unknown to your Lordships that we payed out a great pairt of

our stocks for our offices of Macers of Parliament, Council, and Commissions, and that now the far greater part of our emolument falls by the Unione." As will presently be seen, these macers had probably shared in the funds provided for the seven macers by the Union Parliament in the preceding year, but no doubt they felt that this provision, which was only to last a few years, would be admirably supplemented if the Court listened to their appeal.

Reverting, however, to the last days of the Union Parliament, we find that as the session drew on, apparently the macers, and the other officials connected with the moribund institution, bethought them, not unnaturally, of all their claims based upon past services; and accordingly, on 25th March 1707, they got themselves recommended to "the Lords of Her Majesty's Treasury, for a gratification for their attendance this session of Parliament." The proceedings give further details as to the application, and show that the macers of those days required a gift of horsemanship no longer necessary for due performance of their official duties. They complain of having received "as yet" no allowance for "riding, serving, and attending" the various sessions of Parliament; and further set forth that their emoluments had been grievously reduced by the interruptions in the sittings of various Judicatures, such as the Privy Council, Exchequer, and Commission of Teinds, especially the last-named, whereby they had "lost the greater part of our casual subsistence." In the circumstances, probably they had some good reason to look for the same consideration that had been previously extended to them, and the result justified their anticipations, though Parliament adopted what must appear to modern ideas rather a surprising mode of doing justice.

At that time it is evident that the financial position of not a few of the Royal Burghs in Scotland was, to say the least of it, critical, and the inhabitants were eager to obtain from their Parliament, before its translation to London, such rights of taxation upon various commodities as would enable them to tide over their difficulties. Here was a chance for the financiers of Parliament; they might rob Peter to pay Paul; and on turning to the Acts of 1707, we find they did so in more cases than the one with which we are concerned. The Burgh of Kirkcaldy had by "building of ane Harbour, Tolbooth, and other public works, contracted debts far beyond the common good," and thereby had become so impoverished as to be "in great hazard of going to utter ruin, to the publick Loss of the Nation." For these reasons the Magistrates and Town Council were empowered to collect an imposition of two pence, apart from the excise duty, "upon each pint of ale and beer browen and vended within the priviledges of the said burgh for the space of twenty-five years." So far so good, but then follows the *quid pro quo*, "with the burden of Twenty Five pounds Sterling yearly, to be payed to the seven Macers of Parlia-

ment for the first four years, and Ten pounds Sterling yearly to Doctor Thomas Bower, Professor of Mathematics in the King's Colledge of Aberdeen, towarde a sallarie to himself and successors in the said profession." Certainly the association of the macers with the Professorship of Mathematics at Aberdeen is not readily intelligible, unless it may have been the act of some waggish member of the House; but as the "greater part of the burgesses and inhabitants" of Kirkcaldy are expressly stated to have been agreeable, the arrangement seems to have satisfied all concerned. Notice may be taken that the number of these macers of Parliament is here given for the first time as seven. Whether these seven included the three macers of Privy Council transferred to the newly-established Teind Court does not clearly appear, but certainly it is highly probable, seeing that the Teind macers speak of themselves as having formerly acted as macers of "Parliament, Council, and Commissions." "Council," no doubt, means Privy Council, and "Commissions" refers especially to that for the Plantation of Kirks, etc., sitting when the Union took place, which had followed several preceding Commissions, and was itself constituted by the Acts 1690, c. 30; 1693, c. 24; and 1695, c. 18. The duties of a macer to this Commission must, however, have been very light indeed, as subsequent to the destruction of the Teind Records by fire in the very beginning of the 18th century, nothing, or next to nothing, was done by the Commission of Parliament.

In the light of this transference to the Teind Court of three out of the seven macers of the Scottish Parliament, it is valuable to examine the first "Establishment for Civil Affairs in Scotland" of Queen Anne. This document is dated 23rd June 1709, and contains entries relating to three different classes of macers. Firstly, we find "four Macers of the Session, each ten pounds per annum;" then follow, "three Macers of the Justice Court, each ten pounds per annum;" and lastly, there are "three Macers of the Exchequer, each fifty pounds per annum." This last Court was only established after the Union, by way of introducing English forms of law into what proved an uncongenial soil. The desire was to make the financial arrangements in both countries work harmoniously, and John Smith, an Englishman, was accordingly sent down as the first Chief Baron of Exchequer, and provided with a retinue of officials, including these three macers. Among the records of the Teind Office relating to the early years of the Ecclesiastical Court there exist, besides the petition of the three macers already referred to, an extract certificate, dated 19th April 1708, in favour of one of them, Robert Ballantine, to the effect that he, "a Macer of the Privy Council," had qualified as a macer before the Lords of Council and Session; and in another document, termed "Nott of the Macer's dues," and bearing date of the 24th November

in same year, there is appended an order, signed by the Lord President (Sir Hew Dalrymple), recommending a Committee of the Lords to meet and report upon the dues of the macers. The result of the report appears in the Act of Sederunt of 22nd December 1708, regulating the fees payable to the macers, although this Act does not appear among those published by Sir Ilay Campbell in his volume. In 1726 James Redpath and Humphry Colquhoun, "your Lordships' Macers," approached the Court, desiring a recommendation to the goodwill of the Treasury. The object in view was evidently to get themselves, as Teind macers, placed upon the Civil Establishment, like those officers in the other Courts, for the petition is thus expressed: "While the Privy Council was in being in Scotland there were a great many emoluments of that Court which accresced to these in our office which now is intirely sunk, and that the casuall emoluments ariseing from the Commission of Teynds aforesaid, is not a sufficient reward for the attendance dureing the whole time of Session, though and in virtue of His Majestie's Commission we be bound to attend; and seeing the Lords Commissioners of His Majestie's Treasury are in use to grant sallaries to His Majestie's publick servants who are bound to attend and officiate in publick offices," they pray for a suitable allowance. An order was made by Lord Newhall (Pringle), but without result, so far as can be learned.

Thus it is evident that, from 1709 and downwards for a considerable time, the Courts of Law in Scotland were provided with a force of at least thirteen macers; three of these were paid by fees, and officiated in the Teind Court, whilst of the remaining ten, who were paid more or less by salary, four pertained to the Court of Session as "ordinary Macers," three were attached to the Justiciary Court, and three served the Barons of Exchequer. There seems no reason whatever to doubt that the patronage of all these offices was at the outset vested in the Crown, though in some cases it, by usage, fell into the hands of the Court after an interval. Thus in the case of the Teind Macers we have examined a Commission to Thomas Park, dated 1726, where the appointment is made by sign manual of the Sovereign, under the Privy Seal, "to be one of the said (ordinary) Macers before the said Lords of Council and Session, Commissioners appointed for the Plantation of Kirks and Valuation of Teinds." The vacancy in question had been caused by "the demission and surrender" of John Hogg, described as "merchant in Edinburgh," and presumably one of the three persons who had, nineteen years before, been transferred from Parliament. It should be remarked that the office of macer in those days was evidently held in some considerable repute as compatible with social position, for we find allusions to its having been held by landowners and others whom we should not now expect to find officiating among the deserving class of persons now

fulfilling these functions. Of the three macers transferred originally to the Teind Court, two at any rate contradicted in their own persons the statements made to the Union Parliament about the rapid mortality in the office, for David Graham remained a macer till 1723, and John Hogg did not resign till 1726.

From the earliest times down to the year 1728 the whole of the macers held their offices *ad vitam aut culpam*, and accordingly, when in that year the Crown proposed to make a change, evidently the brotherhood were seriously alarmed, and set to work to get up a counter demonstration. One John Grierson had presented a gift of the macership in his own favour, wherein the appointment was made "during pleasure;" but the Court were induced to make such strong representations upon the subject of the previous custom of life appointments that the authorities gave way, and a Commission for Grierson, in the old form, was ultimately forthcoming. In 1736, evidently the duties of the Teind Macers at any rate were light, or the Commission must have been terribly neglected Judges, for James Redpath, who had been appointed thirteen years before, and perhaps was getting old, applied for an order to allow William Hutchison to officiate, setting forth that one macer was recently dead, and the other, no doubt meaning himself, was frequently absent. This impudent proposal by one macer to fill up a vacancy with his own nominee, was not successful; but two points are brought out by this document—first, that the number of these macers had fallen from three to two, and, for the time at least, to one; secondly, that an idea had already arisen that the Court rather than the Crown had power to fill up vacancies. Where the payment was by fees, and the macers divided these among themselves, it is evident that no great effort would be made to fill up vacancies unless absolute inconvenience were felt. Upon 23rd January 1754 a person named Archibald Murdoch, who is described in the Act of Sederunt as "Macer before the Court of Justiciary," is appointed to be interim Macer in the Court of Session upon the occasion of the illness of two other macers, with a right to a proportion of the fees. The terms of the appointment seem to indicate that the duties were not very onerous, seeing that one man could perform the work of two; but, then, the allotment of a proportion of the fees might thereby also be simplified. In the next reference to the macers, which occurs on 12th February 1754, we see certain symptoms of professional jealousy and exclusiveness. It is the old story of the crowding within the Bar by persons who had no right to be there; but it is no longer "advocates' servants," or "people of all sorts," who vex the soul of the Court. Moved, it is fair to presume, by the entreaties of those concerned, as to the "crowding of Writers and others," the Court laid it down that the place was meant only for "Lawyers" (i.e. Advocates) and Writers to the Signet in their "gowns," and the agents and parties in the particular cause before

the Court. Summary removal to prison by an active and intelligent macer seems to have been the mild corrective for any attempt at irregular practice by outsiders, which possibly the reference to "Writers and others" may point at. A few months afterwards the macers received further directions to apprehend any persons they found, especially on the back benches in the Inner House, "confabulating together or making any noise to the disturbance of the Court."

On 16th November 1757 the Court nominated Archibald Murdoch, macer to the Court of Justiciary, to "act *ad interim*" in the Teind Court until His Majesty should appoint another. The terms in which this Commission runs are as follows:—"The Lords of Council and Session, Commissioners for Plantation of Kirks and Valuation of Teinds, Taking to their consideration that the office or place of one of the ordinary macers to the said Lords Commissioners is vacant by the decease of William Hutchison, late one of the macers of the said Court, and that formerly there were three macers attending the said Lord Commissioners, who had each of them a Commission from His Majesty under his privy seal, and that presently there is but one macer attending on the Court having such Commission, whereby in case of sickness or necessary absence it might happen there should be no macer at all to attend on their Lordships, to the great prejudice of the lieges," therefore they make the temporary appointment. It will be seen from this that Hutchison, though not named, on the suggestion of his friend Redpath had contrived to get a macership somehow. Only three years afterwards, on Murdoch's death, another interim commission was granted, and it is possible that Murdoch had been during the whole time acting merely upon his interim commission. In 1761 there occurs a third instance of the same kind, when James Hannay was appointed *ad interim*. Hannay resigned in 1762, and William Williamson received an interim commission from the Court. There was now, it will be observed, only one of these two macers who held a Commission from the Crown under the Privy Seal, and that was Thomas Park, who in 1726 had been selected to succeed John Hogg, one of the first macers of the Teind Court. In February 1765 Park, who must have been an old man, resigned, but even then his place was filled, not by a Crown appointment, but *ad interim*. Thus practically at this date the Lords Commissioners had succeeded in obtaining the patronage of their two macerships.

We have already adverted to the macers as enumerated in the Civil Establishment of Queen Anne, and an examination of the same documents at the accessions of George I. in 1714 and George II. in 1727 shows comparatively little change; indeed the number and classification of the macers was unaltered, though an allowance of £10 "for circuit" appears in 1714, while in 1727 the

same sum is given "for every circuit," and the salary becomes £20 per annum instead of £10. Even when we come to the reign of George III. no difference is seen. The document from which these facts are derived is headed—"An Establishment or List containing Payments for Civil Affairs, in that part of Great Britain called Scotland, which our pleasure is shall commence and be paid from the 5th day of April last 1761," and bears the autograph superscription of the king. The circuit allowances, number, and salaries of the "Justiciary Macers," so called for the first time in these Lists, are left as they were fixed in 1727. There is no change as regards the three Macers of Exchequer, and "the four Macers of the Session" still appear upon the Establishment with a salary of £10, augmented, of course, largely, as in the case of the Teind Macers (who, however, had no salary), by fees from the suitors. In this same year there will be found among the Acts of Sederunt a somewhat curious reference to the old practice by which two macers attended the Commissioner to the General Assembly, and were present at the election of peers. On these occasions it appears that they took their maces out of Court with them; indeed a macer without his mace would have been but a poor addition to the solemn dignity of such august "functions;" but, on the other hand, the keeper of the Parliament House very properly desired a receipt each time for the due return of the interesting insignia, and the macers demurred. The Court took up the matter, and ordered that in future on such occasions a receipt was to be given. The attendance of these officers at the election of peers no doubt may be traced back to the days of their glory in the Scottish Parliaments, and to a like cause probably we may ascribe the now disused progress of the macers amidst the gorgeous procession of the Lord High Commissioner. Of this latter privilege a trace still remains, for the honour that clung not to the macers adheres to the mace. The particular mace carried before His Grace belonged of old to the Exchequer Court (though from its use at present it has often erroneously been called the Justiciary Mace), and in consequence of its descent has invariably been borne by one of the officers attached to the Exchequer Chambers, since that Court was merged in the Court of Session.

In March 1767 a somewhat serious offence against the regulations laid down by the Court was committed by a certain Patrick Baillie, one, it appears, of the ordinary macers, as his name is not specially mentioned in connection with any particular Court. This gentleman conceived the idea of augmenting an income which, though small in salary, was, with fees, very considerable in amount. His device was to levy a kind of black mail upon suitors, and no doubt he had carried on his little game for some time before an unfortunate selection in a victim brought to his deeds a publicity he probably was anxious to avoid. Baillie having occasion in the performance of his official duties to bring up for

examination a person named Arthur Miller, and described as a merchant in Edinburgh, took the opportunity of demanding from him one guinea "as the fee due to the macers on occasions of that kind." The case seems to have been one of bankruptcy, for Miller was "brought from the Abbey," where probably he was resting secure against his creditors, and very likely the exaction was felt by the poor man to be peculiarly oppressive in the circumstances. But whatever the true story may be, some one gave information against Baillie to the Lord President (Robert Dundas), and a remit to Lord Hailes to inquire into the circumstances brought out the facts, and left no doubt of the guilt of the macer. The judges in their treatment of the delinquent certainly did not err upon the side of severity, for we read that "he was this day called to the Bar and reprimanded, and ordered instantly to repay the money; and the macers were strictly enjoined not to take such payments in time coming, but to be careful to conform themselves strictly to their legal fees." The latter part of this quotation seems to show that the Court had some misgivings, not only as to the acts of the convicted offender, but as to the conduct of his brethren in similar circumstances which might not have transpired, and accordingly the warning is addressed to the whole fraternity. There is too much reason to think that the practice thus checked had been growing steadily for many years, and that the macers, under the guise of a species of "use and wont" very beneficial to their own incomes, were practising at that time many extortions, larger and smaller, upon clients about the Courts, who were either too simple and confiding, or else too helpless to resist the behests of this powerful band of confederates. On 5th July 1780 William Williamson, one of the Teind Macers, wrote a letter resigning his office, and stating that he had been "appointed by his Majesty" assistant to David Hamilton, with survivancy. It therefore appears that so far the interim appointments of the Court had received confirmation in a formal Crown presentation to the office, but after this date there is no further reference to the Crown. On Williamson's resignation, however, the appointment of his successor, John Graham, was, in form at least, that of an *ad interim* commission. During the decade 1780 to 1790 there are evidences in the shape of drafts in the Teind Office that the macers were still busily engaged in efforts to increase their fees, and had at least contemplated addressing not only the Court through its Head, but the Societies of Writers to the Signet, Solicitors before the Supreme Courts, and other bodies. By this time the patronage, according even to the text-books of the day, was "understood to be" in the Judges. In 1796 and in 1798 the two macers of the Teind Court, Andrew Murison and John Graham, represent in a petition for increased fees that the emoluments of their office had sunk to £12 a year, and were still diminishing, but the Court made no order.

Meanwhile, during all these years, the building in which "the Chief Baron and the Barons of his Majesty's Court of Exchequer in Scotland lately sat" had gradually deteriorated to such a degree that in 1806 it was found to be in a "very ruinous state," and in consequence an Act was passed that year for the express purpose of enabling the Barons to take down what were called the Treasury Chambers, and to erect a new Court Room and apartments. But another and more important change was at hand, which had the effect of altering the number of the ordinary macers. It had for some time been found that the number of judges on the one side was too large for the convenient trial of causes, whilst on the other, one Court could not overtake the rapidly increasing business. There were then fifteen judges in the Court of Session, so that, deducting two detached as Lords Ordinary by rotation, and a third in the Bill Chamber, about a dozen usually sat in the one Court together. The difficulty was solved by the Act of 1808, which created two divisions, and made other arrangements with which we are familiar to this day. The number of the macers in ordinary was at the same time raised from four to seven. In the following year John Graham, macer to the Teind Court, then in his 73rd year, asked to be appointed sole macer of that Court during all the days of his life, and his request was granted, an order being made on 22nd November without any reference to the Crown's right of appointment. We must therefore conclude that the patronage had by this time actually changed hands from long usage and interim appointments. An examination of certain details given by the Royal Commissioners in an Appendix to their First Report on Courts of Justice in Scotland, 1816, gives some interesting information as to the value of these ordinary macerships and the nature of the emoluments. Each of the four macers, before the division of the Courts, got on an average about £168 a year, including a proportion they were allowed to retain out of fines levied by them. This was at the time a very handsome emolument, if we remember the great difference in the value of money. The three new macers received £120 each of salary, and no other emolument, it not being thought possible to touch the fees of the older macers. The Royal Commissioners expressed a strong opinion in favour of the payment, in case of future appointments, of a fixed salary of £120, while the fees were all paid into the general fee fund of the Court. Some of these fees are very curious, especially those authorised by an Act of Sederunt of 11th March 1791, to which we have not hitherto adverted. Amongst the items there given appear fees from the Lord President and the Lord Advocate of £2, 2s. each on appointment; £1, 1s. from an ordinary Judge, the Solicitor-General, and every Advocate, W.S., or S.S.C., on admission; and 10s. from each Notary Public. The list shows us also that in 1815 there were still attendances by the macers on the Lord High

Commissioner and at peerage elections, whilst the still more curious brieves, purchased furth of Chancery, were then directed to them. Upon this last matter we shall have more to say hereafter.

We may next turn to the further history of the macers of the Justiciary Court, as they too were considered and reported upon by the Royal Commissioners in their fifth report, ordered to be printed 25th January 1819. These officers were, as we have already seen, three in number, and they appear upon Queen Anne's list with salaries of £10 a year each. Whatever may have been originally the source of the patronage, it was clearly by usage established in the person of the Lord Justice-General at the commencement of the present century. The Commissioners say, "This right of nomination is not expressly conferred on the Lord Justice-General by his commission, but it has been uniformly exercised for a long period of time, and probably from a very ancient date, under the general powers and privileges of his office. We have examined the Books of Adjournal for sixty years back in evidence of the practice, and find the commissions to the macers there recorded to be in the same terms as at present." In the case of sudden vacancies, interim appointments on circuit were made by other judges, of which an example occurred in 1818. At that time the Justiciary macers, along with other duties still performed by them, took charge of convicted persons and lodged them in prison. In the days of Queen Anne and George I. there was only one circuit, but in 1748 the second circuit, which had been discontinued, was renewed, and consequently the allowance to macers was doubled, and became £20. By warrant of 14th October 1795, this sum was increased to £30. For "the expences of each circuit" there appears a sum of £27, 10s., paid in Exchequer, as set forth in the Establishment of George IV. This sum was, in 1748, £10, and was gradually increased till 1810, when it reached £27, 10s. When the Royal Commissioners entered upon the question of fees, the inquiry became a thorny one, it being found impossible to ascertain when several of the fees and rates of fees began to be charged, or by what authority. The inquiry, however, showed that even since 1791 "the rates of many fees have been augmented, and some new fees of considerable amount have been introduced." A comparative table follows, showing the charges in 1791 and 1818, which sufficiently establishes the astounding fact that macers in those days were pretty well masters of the situation as regards their fees of office. At that date each of these persons on an average got out of Exchequer £105 in all, and from fees close upon £85, so that they enjoyed about £190 a year. The recommendation made by the Commissioners in 1818 was the abolition of all fees and perquisites, and in lieu a fixed and inclusive salary of £150.

(To be continued.)

FIFTEENTH REPORT ON THE JUDICIAL STATISTICS OF SCOTLAND, BEING FOR THE YEAR 1882.

(Continued from p. 205.)

THE report proceeds with the details of the Justice of Peace Court, the last of the Judicial Courts, the proper limit of judicial statistics. This Court has jurisdiction in debts to the extent of £5, expressly confined to proper debts, and not mere questions of property. The report on this department commences, as with other Courts, with a retrospective table, entitled a "Comparative Table of the Business in the Justice of Peace Small-Debt Courts in the years 1878 to 1882 inclusive." These Courts are presided over by any one who is in the Commission of the Peace. One Justice may give decree in absence, but two at least are necessary for the hearing of a case. There is no appeal to Quarter Sessions, and a very limited review by way of reduction in the Court of Session very rarely had recourse to.

	1878.	1879.	1880.	1881.	1882.
Total causes initiated during the year or in dependence at its commencement, . . .	15,717	14,341	15,971	14,862	16,731
Decrees—whereof, . . .	14,181	12,332	14,257	13,320	14,880
In absence, . . .	10,649	9,095	10,655	10,071	11,382
<i>In foro</i> , . . .	3,532	3,237	3,602	3,249	3,498
Total claims, . . .	£28,533	£24,963	£27,390	£25,213	£26,249
Total fees received, . . .	1,456	1,298	1,524	1,570	1,467
Total costs awarded to parties—pursuer, defender, or otherwise (?), . . .	1,944	1,639	2,134	1,639	2,678
Total sales under poinding (?), . . .	45	71	67	86	61
Principal sums, . . .	£125	£185	£180	£213	£152
Total expenses in decrees, . . .	7	12	11	13	10
Free proceeds of sale, . . .	111	101	146	192	149
Total expenses of poinding and sale, . . .	38	57	49	69	62
Total surpluses paid to debtor (?), . . .	4	6	2	5	7

Agents, though prohibited by statute, appear from the report to be admitted, and chiefly for the pursuers. The same minute details are given as in the Sheriff's Debts Recovery Court, but are here omitted, such as "amount decerned for," and "amount not decerned for," "allowing the full claim," "allowing partial claim or otherwise;" decrees "disallowing the whole," or "disallowing part." As to these points, we repeat our observations previously made, that they are wholly unnecessary and of no utility.

The general table, which we have abridged, is followed by three tables distributing the figures for the year 1882 amongst the ninety-nine Courts which are held throughout Scotland under the Act. It appears from the report that in no less than sixty-one instances no Courts were held in the places stated in the report as at one time designed for such Courts! Amongst the places where no Justice of Peace Courts were held in

1882 we find Aberdeen, Inveraray, Ayr, Alloa, Dumbarton, Elgin, Forfar, Kinross, Nairn, Perth ; in fact, in every place where this Court is brought in comparison with the Sheriff's Small-Debt Court it appears to have become defunct. In six Courts the cases disposed of did not exceed ten. It is matter for consideration whether these now defunct or expiring Courts should not be abolished, or at least that they should not encumber the annual Report of Judicial Statistics, seeing that they add nothing to the information required. Only twelve of the number reported had upwards of 100 cases disposed of in 1882, of which Edinburgh had between the county and city 4919; Glasgow, 6286; Hamilton, 1126; and Dundee, 690. A remarkable fact appears in the tables: whilst the values for which decrees in absence and *in foro* are given, the number of cases in which decrees are thus given are not mentioned, but are thus disposed of—"By decree, and otherwise than by decree." In several of the particular tables applicable to the varied Courts, the several columns appropriated for figures are left wholly in blank, and surely might have been dispensed with. We observe that in the year 1882, whilst for the "pursuer alone" 262 agents appeared to conduct the case, only 89 agents for the "defender alone" were heard, and 32 cases where agents appeared for "both pursuer and defender." It was only in thirteen Courts that agents appear to have been admitted to plead. As by far the greater number of decrees are pronounced in absence, and the Bench is composed generally of laymen, it is a matter of consideration whether the exclusion of law agents, as originally designed, ought not to be adhered to, as more likely to the right decision of the case. But at all events it would be a correct use of the privilege that agents should only be admitted for parties on notice of the intention being given to the opposite party. One very important fact is shown by the last of the tables, namely, the operation of the decrees obtained by these Courts in 1882. Out of 14,880 decrees, only 61 were put in force by the operation of poinding, and that only in seven Courts; in all the remaining ninety-two Courts the decrees appear to have been inoperative (although it may be said that they were voluntarily implemented). The results of the sales on poindings were given in the general table for five years. In this last table the total sums in decrees on which sales were made amounted to £152, 1s. 1d.; the total expenses in the decrees were £10, 19s. 10d.; the total expenses of poindings and sales were £62, 12s. 4d., being 41 per cent. on the *cumulo* sums in the decrees. The free proceeds of the sales were £149, 7s. 6d., to satisfy £225, 13s. 3d. There were only four Courts where sums were paid to debtors as surplus, the *cumulo* sums being £7, 16s. 10d., the lowest being 6s. 1d., under the head of the Court at Dundee; the highest under the Justice of Peace Courts in Edinburgh. Thirty sales were reported in 1882 in Edinburgh, for sums in all, with expenses, amounting to £91, 18s. 7d.

The expense of these pointings and sales was £25, 8s. 6d., leaving, after satisfying the decrees, £5, 10s. 11d. as "total surplus paid to the debtors." It may be matter for consideration, where the expense is so great, whether pointings and sales ought not to be limited to movables sufficient to satisfy the decree, or some other arrangement whereby the creditor first in the field may not obtain payment of a debt to the prejudice of all other creditors.

The latter part of the statistics is devoted to judicial records, although the first table cannot well fall under that denomination. It is a very important table, or rather tables, and is titled bankruptcy, meaning rather sequestration, whereby bankruptcy is judicially consummated, and excludes all instances where bankruptcy has been arranged by private settlement, by composition or trust-deed, and where the estate has been settled under the process of cessio, which in small estates will greatly supersede the more expensive mode of sequestration. As has been usual in dealing with the previous departments, the first table is retrospective, and consists of cases of sequestrations for the years 1877 to 1881 inclusive:—

	1877.	1878.	1879.	1880.	1881.
Number of bankruptcies (meaning sequestrations) in dependence at the commencement of the year, . . .	2796	2833	3084	3672	3629
Awarded during the year, . . .	543	717	1072	582	450
Reopened, . . .	4	3	5	1	4
Recalled, . . .	4	2	4	6	6
Wound up by final division and discharge, . . .	359	293	254	332	396
Wound by composition, . . .	97	108	165	150	92
Wound by deed of arrangement, . . .	13	21	24	21	16
Otherwise wound up, . . .	45	41	38	64	59
In dependence at the end of the year, . . .	2845	3088	3676	3632	3514
Time between awarding (sequestration) and discharge of bankruptcies wound up by final division—					
4 months and under 1 year, . . .	23	30	18	44	32
1 year and under 18 months, . . .	59	50	62	113	66
18 months and under 2 years, . . .	60	44	46	78	70
2 years and under 3 years, . . .	60	58	62	80	133
3 years and under 4 years, . . .	34	26	22	26	43
4 years and under 5 years, . . .	19	21	17	9	23
5 years and upwards, . . .	85	64	27	32	24
Bankruptcies (sequestrations) awarded during the year—					
By Court of Session remitted to Sheriffs, . . .	99	103	161	87	85
By Sheriffs of Counties, . . .	444	614	911	495	365
In sole sequestrations, . . .	499	628	975	549	403
In joint or partnership sequestrations, . . .	88	189	204	71	103
Whereof—					
1. Traders, . . .	431	622	857	420	372
2. Manufacturers, . . .	54	74	106	40	32
3. Farmers, . . .	27	44	113	93	56
4. Lawyers, . . .	3	8	23	8	6
5. Medical Practitioners, . . .	4	0	7	0	3
6. Clergymen, . . .	0	0	3	1	0
7. Persons not acquiring income by any occupation, . . .	14	23	21	29	14
8. Not included in the foregoing, . . .	54	46	54	29	23

Classification of bankruptcies (sequestrations?) concluded by final division and discharge, according to the value of the estates realized—

	1877.	1878.	1879.	1880.	1881.
Estates under £100,	39	39	23	59	52
Of £100 and under £500, . . .	141	132	113	171	152
Of £500 and under £1000, . . .	58	42	45	61	80
Of £1000 and under £5000, . . .	76	56	48	74	92
Of £5000 and under £10,000, . .	18	10	15	12	14
Of £10,000 and under £50,000, .	12	13	10	4	6
Of £50,000 and under £100,000, .	1	1	0	1	0
Above £100,000,	0	0	0	0	0

Rates of dividend per £1 upon the unsecured debts in bankruptcies concluded—

No dividend,	36	35	23	45	50
Not exceeding 1s.,	51	50	42	71	85
Exceeding 1s. and not exceeding 2s. 6d.,	65	52	49	97	85
Exceeding 2s. 6d. and not exceeding 5s.,	80	76	69	88	97
Exceeding 5s. and not exceeding 10s.,	77	56	49	54	59
Exceeding 10s. and not exceeding 15s.,	17	14	13	16	15
Exceeding 15s. and not exceeding 20s.,	4	5	3	8	1
At 20s.,	10	5	6	3	4

Bankruptcies (sequestrations?) concluded by final divisions and discharges—

	1877.	1878.	1879.	1880.	1881.
1. Gross estate (estates?) per inventory and valuation by trustees, . . .	£724,803	£748,468	£591,250	£601,959	£696,271
2. Debts of all kinds as ascertained by the trustees,	1,666,298	1,614,062	1,163,935	1,243,359	1,610,253
3. Sums recovered by the trustees during the sequestration (sequestrations?), . . .	692,664	606,663	416,264	490,248	514,850

Disposal whereof by Trustees.

Expenses—

1. Allowance to bankrupts, . . .	£2,362	£1,117	£7,246	£942	£1,739
2. Trustees' commission, . . .	30,028	26,422	21,479	20,739	23,418
3. Law expenses,	36,664	29,967	23,914	28,080	32,291
4. Miscellaneous ordinary expenses,	14,753	11,832	10,926	12,632	13,985
5. Miscellaneous extraordinary expenses, . . .	96,327	44,563	25,541	17,645	45,482
Total expenses,	£180,136	£113,903	£89,109	£80,042	£116,917

Dividends—

1. To secured or preferable creditors,	194,583	150,678	126,630	222,041	196,755
2. To unsecured or ordinary creditors, . . .	313,881	341,786	199,945	187,155	200,020
3. Less over-payment by trustees, . . . .	...	...	...	...	...

	1877.	1878.	1879.	1880.	1881.
4. Add surpluses paid to bankrupts or their representatives, less over-payments made by trustees in certain sequestrations,	4,063	274	579	1,009	1,156

Note.—The variation in the various sums must greatly depend not only on the number of sequestrations for the several years, but on the amount of the estates under sequestration, and any one or two estates under sequestration might of themselves sufficiently account for the variations. Nevertheless, the gross sums appearing in the report afford material for consideration. The large sum appearing under the name of miscellaneous extraordinary expenses may arise from litigation in separate sequestrations, and cannot therefore form an essential item to the realization of bankrupt estates under the process of sequestration.

The report proceeds to give the statistics of judicial factories for the same five years as in the preceding tables:—

	1877.	1878.	1879.	1880.	1881.
Number of bonds lodged with the accountant, and standing over from previous year, .	966	1017	1037	1039	1065
Wound up or recalled, .	83	99	128	112	114
Nature of appointments—					
1. Factors <i>locoutoris</i> ,	423	455	485	481	477
2. Factors <i>locoabsentis</i> ,	68	71	70	66	64
3. Curator <i>bonis</i> ,	475	491	482	492	524
1. Accounts rendered within the year, . . .	858	883	897	906	927
2. Not rendered as not due before the end of the year, . . .	107	132	140	130	137
3. Accounts due but not rendered within the year, . . .	1	2	...	3	1
Amount of funds—					
1. Personal estate, .	£2,569,908	£2,699,567	£2,503,589	£2,516,989	£2,425,306
2. Lands and heritages (values not ascertained).					
Revenue of estates from—					
1. Funds, . . .	93,960	94,033	90,794	89,852	83,914
2. Annuities, pensions, etc., .	19,056	21,776	24,379	20,451	31,611
Expenditure for—					
1. Maintenance of wards, . . .	89,785	94,231	84,001	92,357	99,843
2. Factors' Commissions, . . .	14,842	14,110	12,594	12,268	12,429
3. Accountants' charges, .	1,526	1,528	1,126	1,290	1,440
4. Law-agents' charges, .	7,775	6,242	6,335	7,421	7,178
Total revenue, . . .	252,297	244,026	229,344	215,802	231,249
Total expenditure, . .	113,929	116,107	194,058	113,337	120,892

Note.—It will be observed that the previous judicial tables include the year 1882, but those applicable to judicial factories terminate with the year 1881.

The report details important results of bankruptcy (meaning sequestrations), and subsequently and regularly gives a return for the year ended 31st October 1881. We cannot understand how this additional table should have been thought necessary, as the

whole details here given are found in the column appropriated for 1881 in the quinquennial and comparative table. It may be that in some instances the figures in this latter table are presented in a different manner than in the comparative table, but we do not consider that any gain is thereby obtained in comparison with the trouble and expense of this additional table for 1881. A separate table in like manner is given for judicial factories for the year 1881, already embraced in the quinquennial table, and the same observations apply to this seemingly unnecessary table as we ventured to offer as to sequestrations.

The report concludes with judicial records. At Edinburgh for the year ended 31st December 1882, there were 3885 original writs presented at the Register, and 299 second extracts of writs previously recorded, and the total fees received in stamps and otherwise amounted to £4236, 11s. The total number of protests on bills and notes registered in Edinburgh was 326, the number of persons protested against 425, and the total sums protested for £23,061, 13s. 10d. Certificates of foreign judgments entered under the statute were 47, of which from England were 45, and 2 from Ireland. There were 595 adjudications registered in the year, whereof 425 were in mercantile sequestrations, and the fees for registration were £52, 16s. 2d. There were 1039 inhibitions registered, of which 449 were mercantile sequestrations, and the total fees received were £163. Twenty-four hornings were registered, and the total fees were £5, 10s. A return is given by the Clerk of the Bills of the business passing through the Bill Chamber for the same year. From this it appears that 360 cases were presented, or moved in, being cases from the previous year, and 325 were disposed of by the Lord Ordinary, leaving 18 undisposed of at the end of the year.

The report contains returns from the thirty-four keepers of District Registers of Sasines for the year 1882. The total number of entries in presentment book during the year were 27,825, of which Edinburgh had 6006, and the "Barony and Regality of Glasgow" had 3229. The total fees received were £25,726, of which Edinburgh received £5662, and Glasgow £3987. The report finally concludes with "Registered Protests on Bills and Notes in forty-eight Sheriff Courts in the year 1882," including the General Register kept at Edinburgh (already given, and which ought not to have been repeated). The number was 1911. The total number of persons protested against was 2267, and the total sums protested for was £88,361, 16s. 4d. The fees received, singularly enough, are not here given, as in all other instances.

Whilst we have more than once reflected on minute statistics being given on points of no practical importance, too much praise cannot be given to Mr. Donaldson for his labour in preparing these annual statistics, and we trust those for 1883 may be issued sooner than those for the previous year.

Correspondence.

(To the Editor of the Journal of Jurisprudence.)

EVIDENCE OF ACCUSED IN CRIMINAL CASES.

SIR,—In considering the question as to whether a prisoner should be allowed to give evidence in his own behalf, it is necessary to glance for a little at the rules of evidence as they exist with regard both to civil and criminal actions. As a general rule, with regard to civil actions both pursuer and defender are competent witnesses, and are not only allowed, but if duly cited, can be compelled to give evidence. Thus in a civil action the pursuer himself can give evidence, and if he wishes to have the defender's evidence, the pursuer is entitled to have the defender put upon oath and examined. This rule of course applies *vice versa*. The advantage of this system is manifest. Suppose, for example, that the pursuer in a civil action were not allowed to give evidence, and that the evidence to be given and the consequent issue of his case were to come entirely from outside, there might of course be instances in which the pursuer's case would be proved without him by other persons, and by various facts and circumstances which could be adduced; but in very many cases it is the pursuer's own evidence which really is the foundation of the whole proof. Other witnesses can speak to this or that fact, and corroborate the pursuer in various points, but without the pursuer's own evidence the whole proof would very often appear fragmentary and incomplete.

With regard to criminal proceedings the case is entirely different. After a man is apprehended on a criminal charge, that is, for any serious offence, he is taken before a magistrate. The magistrate then explains to him the nature of the offence with which he is charged, and asks him what he has to say. All that the pursuer says is entered in a declaration, and if he refuses to answer particular questions or all questions, the fact of his total or partial refusal, as the case may be, is also noted. Until this examination is over the prisoner is not allowed to have any legal advice. After the prisoner has been committed for trial, and before the criminal libel or indictment has been actually served upon him, he may be re-examined, that is, the authorities may of their own accord give him an opportunity of emitting a second declaration, or the prisoner himself may express his desire to emit a declaration, in which case the Sheriff or magistrate will receive it. At this stage of the case, that is, after the committal, but before this libel has been served, the prisoner can have the advice and assistance of an agent, both in considering whether he will emit any further declaration, and also as to what he may state in his declaration. After the libel has been served upon him, no

further declaration can be either asked or received from the prisoner. And now with regard to these judicial declarations which the prisoner has made, What effect have they as evidence? It has been decided that the prisoner's declarations cannot be received as evidence on behalf of the prisoner, although they may be received as evidence against him; that is to say, the Crown counsel or the public prosecutor can read or withhold the prisoner's declarations just as he chooses. If the Crown counsel or public prosecutor considers that producing and reading the prisoner's declarations will assist him in obtaining a conviction, he can read the declarations; but, on the other hand, neither the prisoner nor his counsel are entitled to demand that these declarations be read. The result of all this is that by the present mode of criminal procedure the prisoner, from the moment he is apprehended to the moment he is either acquitted or condemned, has no opportunity beyond merely pleading guilty or not guilty of stating out of his own mouth, to a judge or to a jury, any facts or circumstances connected with the crime or offence with which he is charged. Is there any reason why a prisoner should not be allowed to give evidence in a matter so closely affecting his own interests? Is not this what the laws of Britain say to a man who is apprehended on such a serious charge as that of murder: "You are charged with murder, and you will on a certain day be brought before a judge and a jury, and you will then be asked whether you are guilty or not guilty of this charge; but you must understand that you have no right whatever beyond pleading guilty or not guilty to say a single word for yourself. It is quite possible that at the very time you are charged with having committed this murder you were most innocently employed. You may have been ministering to the sick or protecting the orphan, or doing some other benevolent act, but you cannot be allowed an opportunity of stating this yourself. If you had been the defender in an action which had been brought against you by some petty tradesman for non-payment of a paltry account, you would have been allowed to step into the witness-box, and hold up your hand and swear by Almighty God that you had paid the account; but in this case where your life is at stake, and you are standing as it were with time holding you by one hand and eternity by the other, we deny you an opportunity of appealing to the Deity, and of stating in the court that you are innocent, as you say you are, of this crime, and of mentioning every fact and circumstance which may tend to prove your innocence. It may be that it is only your own evidence that can supply the link in the chain of evidence necessary for your acquittal, and that, therefore, without this opportunity which you so much desire you will be condemned. But this cannot be helped. The laws of Britain have been well and wisely considered; you have had the high privilege of being born in this great Empire, and are subject to these

laws; and since by these laws you cannot have that opportunity of supplying this link in the chain of evidence necessary for your acquittal, then you must be hanged." What is the reason that the prisoner is not allowed to make oath and give evidence in a criminal matter? Baron Hume, and most other criminal authorities, assign as a reason that if the prisoner were put upon oath he might commit perjury. It is surely a most miserable theory to hold that it is better to risk a man's life than to give him an opportunity of telling the truth for fear he should tell a lie. As the foregoing remarks go to show, it is the innocent man who is most likely to suffer by the present system. Suppose then that the accused in a criminal case were allowed to give evidence, not compelled to do so, but the question whether he will or will not do so being in his own option,—if he were innocent he would thus have every opportunity of fully stating both to judge and jury the fact of his innocence, and of making every explanation, and of answering all questions connected with the crime with which he is charged. His own words, his looks, his gestures, in fact his own story told in his own language and manner, would undoubtedly often have ten times greater effect than the most ingenious theory laid down by the most learned and eloquent of advocates. Since this rule as to giving evidence would be merely allowable and not compulsory, a man who was actually guilty might very often refuse to be examined, simply for the reason that there were many circumstances which he could not very well account for, and therefore it was much wiser for him to be silent. So far as that is concerned, the change of law would not affect him. But in any event, were the criminal law so altered as to allow the accused person in criminal cases to give evidence, it would be impossible for any one to witness such an anomaly as that of a man being allowed to perjure himself over a dispute as to a few shillings of money, while if his dearest possessions, his reputation, his liberty, or his life, are in the balance, the laws of his country tell him he must be dumb.—Yours, etc.,

W. F. MACKINTOSH.

ARBROATH, June 1884.

Reviews.

The Law of Marriage and Divorce as Established in England and the United States. By DAVID STEWART, of the Baltimore Bar, Joint-Author of Stewart and Carey's "Law of Husband and Wife in Maryland." Sumner, Whitney, & Co., San Francisco. 1884.

IN this volume, which can be easily carried in one's pocket, Mr. Stewart has digested the law relating to husband and wife as it

exists in the United States; and as in many of the States the common law is founded on English law, he has freely availed himself of the principles laid down in English text-books as well as in decided cases. Notwithstanding its compressed form, a very great amount of information is given in an instructive way, and the references are numerous, both to statute law and to the decisions of the various State Courts. When we remember that the 38 States and 10 Territories of which the Union is composed have distinct laws on this subject, and that the Supreme Courts of the United States are not entitled to exercise any control over the judgments of the State Courts, while the Legislature of each State has enacted marriage laws for itself, and the National Government has no power to establish one general law, it is not surprising that the author "should tell us that it has been found impossible to formulate definite rules covering the inharmonious statutes and decisions of all the States." All that could be attempted was to lay down the general laws which are everywhere the same, and to indicate the differences which exist. This has been done, and apparently with much care. For the sake of brevity, he is frequently obliged to say, "that in many States," or "in most States," or "generally" that such a rule prevails, or that different rules have been enacted by different Legislatures whose statute-books must be consulted by the reader for more precise information. If, however, the reader desires merely to know the general system of law, and to be put on his guard as to the existence of the numerous differences, he will find Mr. Stewart's book both useful and interesting.

One is too apt to regard the United States as a homogeneous whole, and to forget that the various origins of the States have left imprinted on their laws tendencies which still survive, and that the differences thus occasioned have been accentuated by the action of the State Legislatures. In neighbouring countries of the Old World, the growth of independent systems of law does not do the same mischief which one would expect to result from a similar state of matters in a country like the United States, the population of which is so much on the move, and where the citizens so easily and so frequently change their residence from one State to another. There are none of the barriers of race, language, or government which in Europe prevent the inhabitants of France or Germany passing in large numbers into the adjoining countries.

It is, however, remarkable that the inconvenience and perplexities occasioned by the existence of a large number of different codes, should not have forced itself upon the attention of a practical people. Change of residence from one State to another is vastly more common in America than in Europe, and when to this is added the intimate relations which persons in any one State have with persons elsewhere, one would imagine that the

hard cases arising from differences in the laws would be numerous. These differences touch nearly every part of the marriage law. Thus in some States the common law rule prevails that minors under 12 and 14 cannot marry, but elsewhere 14 and 16 and 16 and 18 are the ages prescribed by statute. Marriage within the prohibited degrees is in some places void, in others voidable only. Except in Virginia, a man may marry his deceased wife's sister. In some places marriage between whites and negroes or Indians is a crime, and to add to the troubles of lovers of different races, the definition of a negro varies in the States which forbid such alliances. A bigamous marriage is null everywhere, except in New York, where it is voidable only, and then only if declared in a suit brought by one of the parties in the lifetime of the other. In six States a marriage celebration is necessary, in eighteen it is unnecessary, in four it is probably necessary, in eight it is probably not, and in five the question is undecided, while the learned author remarks that "in these States the law is in such a condition that should the question arise directly it might be decided either way." It is doubtful whether the English Statute of 1604, forbidding bigamous marriages, is in force in the United States; but in Maryland it is, and in Pennsylvania it is not.

South Carolina enjoys the distinction of being the only State in which divorce *a vinculo* is not permitted, while in many of the States judicial separations have been abolished. It is, however, easy to pass from one State to another, and many complications arise as to the validity of divorces where the defender is not domiciled in the State. Some States recognise the validity of a divorce granted without notice to the defender, and at the instance of a complainant who alone is domiciled within the jurisdiction of the Court, while other States refuse to acknowledge the validity of such decrees. Marriage is held to be not a national matter but a domestic relation within the control of the several States. Accordingly the United States Courts have no divorce jurisdiction, and State Courts have only jurisdiction when given them by the Legislatures of their respective States. Some Legislatures have given divorce jurisdiction to their Courts where the complainant has been six months resident; others, more difficult to please, demand a residence of three years; while others make jurisdiction depend on the *locus delicti*; and others again on the domicile of the parties when the offence was committed. The choice of Courts, which is open to the complainants, is a matter of great importance, because the causes of divorce differ in the strangest way.

Adultery in some States is not sufficient unless continued, or aggravated by desertion, etc.; while desertion for a period varying from one to five years is a ground for divorce in most States, but in others only for judicial separation. In Kentucky and Wisconsin voluntary living apart for five years is a cause for

divorce, and so has absence unheard of for seven years in Vermont, or three years in New Hampshire. In twenty-nine States and Territories cruelty founds an action of divorce, but in seven it only entitles the injured party to a separation, and in two a husband whose wife ill-treats him has no remedy. The definitions of cruelty vary from "intolerable severity in either party," which is sufficient in Vermont, to "cruel and barbarous treatment endangering the wife's life, or offering her such indignities as to render her life intolerable and life burdensome, and thereby forcing her to withdraw from his house and family," nothing less than which will be accepted by the Courts of Pennsylvania. Similar differences exist with regard to drunkenness as a ground for divorce or separation, while there are some interesting distinctions drawn by the statutes of several of the States. Thus several require the habit of drunkenness to have been acquired before marriage, apparently on the ground that if acquired afterwards the other spouse is partly responsible. In California one year's drunkenness is enough, while the Courts of Colorado and Illinois demand two years' persistence in the vice, and in Ohio the drunkard has three years in which he may reform himself. In the same way, and with the same variety of time, neglect to support his wife renders a husband in some States liable to be divorced or separated. Imprisonment for life, or sometimes merely for a term of years, subjects the criminal to the risk of divorce, but generally only if he is imprisoned in a prison of the State which has divorce jurisdiction over him. The Legislatures of Kentucky, Massachusetts, and New Hampshire authorize divorce in favour of a complainant whose spouse has joined the Shakers; while in Ohio and Wisconsin, if one spouse obtains a divorce in another State, the defender is entitled to obtain a divorce from the Courts of these States. Lastly, in Connecticut a divorce may be granted "for any such misconduct as permanently destroys the happiness of the petitioner and defeats the purposes of the marriage relation;" in Kentucky, for any cause "in the discretion of the Court;" in Maine, when the Court thinks it "conducive to domestic harmony, and consistent with peace and morality of society;" in Washington Territory, for any cause "deemed sufficient." These different provisions have apparently been fully taken advantage of, to judge from the selected cases to which Mr. Stewart refers; and if he is right in citing an English authority to prove that "to try to prevent marriage is the blackest of all political sins," the laws of the United States seem to present ample facilities for putting an end to the marriage bond. For all the propositions which are laid down authority is given by reference either to decided cases or to statutes; but we should not, however, have thought it necessary for the author to cite two authorities to prove that "love is not an essential" to the validity of a marriage. The authority for the prohibition of marriage

within the prohibited degrees is characteristically expressed thus: "This incapacity is based, remotely, on the laws of an ancient and peculiar people; directly on statute 32 Hen. 8, c. 38, and its more modern counterparts. The incapacity through near blood relationship finds sanction in physiology, but that arising from relationship by marriage is kept extant only by superstition and ignorance."

In short, this book presents an epitome of the marriage laws of the United States, where any one desirous of finding the most diverse views of policy in regard to the most important of personal relations, will be directed to the best sources of information.

The French Law of Bills of Exchange, Notes, and Cheques, compared with the "Bills of Exchange Act, 1882," with a parallel Table of Reference and Index. By THOMAS BARCLAY, of Lincoln's Inn, Barrister-at-Law, Author of "Les effets de commerce dans le droit Anglais: la lettre de change, le cheque et le billet a ordre and L'Emancipation contractuelle de la femme mariée en Angleterre." Waterlow & Sons, Limited, London and Paris.

THIS translation of the articles of the Code de Commerce dealing with bills and notes will be found useful by merchants and bankers who have business relations with France. The French law is comprised in eighty articles, while cheques which are not treated as bills to all purposes are regulated by a short Act passed in 1865 and amended in 1874. The provisions of the Code, which are deserving of study by Scotch and English lawyers, are based upon the ordonnance of 1673, and have undergone little alteration since their promulgation in 1807. The French Code is more technical in its expression than the Bills of Exchange Act, and demands a closer adherence to its provisions. Thus a French bill must not merely state that value has been received, but must define the particular value, as "in cash or in goods" or "on account," or otherwise as the case may be. One result of this strictness is to oppose difficulties to the use of accommodation bills. Bills payable to bearer are not allowed, and the words "or order" or similar expressions are necessary not merely to give the document negotiability, but to make it a bill. An order wanting these words is treated as a *simple mandat*, and does not fall under the provisions of the Code relating to bills. The first essential of a bill according to the French law is that it be drawn "from one place on another," and the use of bills is thus very much limited. The provisions as to protests, which must be taken in the case of inland as well as foreign bills, are very stringent, and the holder is obliged to take proceedings on a protested bill against the party from whom he received it within a limited period, depending on

the distance of the domicile of that party from the place of payment. The Code is also careful to provide for the ascertainment of the amount of the re-exchange of a dishonoured bill, and requires that the redraft be accompanied by a "return account" comprising the principal sum, expenses of protest, banker's commission, brokerage, stamps and postage, as well as the rate of exchange certified by an official broker, or two traders, if there be no official broker in the place. In the case, however, of unstamped bills, the drawer and acceptor cannot escape, as they sometimes do under the stricter provisions of the English Stamp Act.

Mr. Barclay has added a few notes explanatory of the meaning of the articles as they have been applied by the French Courts; but as precedents have no force in France, the judgments given are only a guide, and do not form authoritative interpretations. The corresponding sections of the English Act are noted under each article, and a short introduction explains some of the points of difference between the two laws. With one or two of the author's observations we do not agree. Thus he says that the presumption of value does not exist in French law; but it seems that the same presumption arises in France as in England, subject to the proviso that the bill in France must contain a statement of the value. If it does, that statement *prima facie* receives effect. The author also seems to have fallen into an error in regard to "avals." The provisions of the English law, which are more in consonance with the Law Merchant than those of the French Code, certainly permit their use, and their use is very far from uncommon. The liability of an English "aval" seems to be the same as that provided by article 141; but in France, apparently a third party may guarantee the drawer that the acceptor will pay. Here this can only be done by addressing the bill to the guarantor, who shows that he is a guarantor by adding the words "as cautioner" to his signature, and so secures his right of relief against his co-acceptor. In other words, no one but the drawer or an acceptor for honour can accept an English bill.

The Confirmation of Executors in Scotland, according to the Practice in the Commissariat of Edinburgh, with an Appendix of Forms, etc. By JAMES G. CURRIE, Depute Commissary Clerk of Edinburgh. Edinburgh: William Green. 1884.

THIS work is a welcome addition to the yearly increasing library of treatises on special branches of Scots law. Mr. Alexander's work on the same subject is now out of date, and for many years the only source of information on this special subject has been the author of the present treatise. With unfailing courtesy he

has been ever ready to impart the benefit of his experience to members of the profession and the public, and it is a subject for congratulation that he has found time to make that experience more generally available by publishing the present treatise. From notes made during the last twenty-five years, Mr. Currie has been able to give decisions and instructions by Sheriffs, in cases involving specialties, which will be found reported nowhere else. These cases and their bearing are fully commented on in the text, and this, combined with the very full appendix of forms, constitutes the special value of the book. In other matters the book bears evidence of careful and accurate work. We would call attention to the chapter on "Domicile," where this difficult subject, so far as bearing on confirmations, will be found set forth with great clearness. Mr. Currie's intimate acquaintance with the details of Commissariat practice appears everywhere in the book, and makes it one of great practical utility.

Outline of the Law of Joint-Stock Companies; being Four Lectures delivered to the Institute of Bankers in Scotland, and the Institute of Accountants and Actuaries in Glasgow. By JOHN CAMPBELL LORIMER, LL.B., Advocate.

THE Institute of Bankers is indirectly doing for the science of jurisprudence what is being done on all hands for the various branches of mental and physical science. By securing the publication of short courses of lectures on legal subjects, which have been previously delivered to its members by those most competent to deal with the subjects chosen, it is slowly providing what promises to be a most valuable series of handbooks on the different departments of mercantile law. The lectures composing the second of these courses were delivered some years ago, but their appearance has been somewhat delayed, owing apparently to the inherent modesty of the lecturer, which seems at length to have been overcome by the success and encouragement attendant on their re-delivery this year in the capital of the west. To the city of Glasgow, indeed, we are indebted in more ways than one for this work, since the liquidation of its City Bank raised many new, complicated, and interesting points in company law, and the experience gained by Mr. Lorimer as junior member of the noble army of counsel who represented the liquidators, has helped to make him one of the leading authorities on that subject. This delay in publication is not altogether matter of regret. Many important questions have occurred for solution since 1881; the liquidation of the City of Glasgow Bank has been brought to an end, and the whole subject can be treated in a more exhaustive and comprehensive manner than was possible three years ago. Evidence of this is conclusively furnished by the number of

references to the most recently issued volumes of the Reports, and the author may be congratulated on the way in which he has incorporated the results of cases decided since the first delivery of these lectures without any trace of patchwork being visible.

This book shows at a glance the thoroughness with which its subject-matter has been digested. It is called an "Outline of the Law of Joint-Stock Companies," but it is more than an outline, for it contains within itself many of the materials for filling it up, and indicates very fully where the rest of such materials is to be found, and it wants that sketchiness which is the failing of so many "outlines."

Beginning with a history of the evolution of the joint-stock company from the germ of the common law partnership, and of the development of the joint-stock company as the creature of statute, during the period from 1825 to 1879, when the benefits of limited liability were placed within the reach even of companies previously unlimited, the author "proceeds to bring under our notice the leading features in the constitution, administration, and winding-up of joint-stock companies." The first and second of these subjects having been dealt with in lectures I. and II., the concluding lectures are devoted to questions connected with the winding-up, which the author, with a certain grim humour, designates "the stage which seems to come sooner or later to the majority of companies."

The lecturer has throughout carefully kept in mind the two classes whom he was addressing,—those who might be presumed to have little or no previous knowledge of the subject, and those to whom the leading principles were familiar, and who desired information chiefly on the more out of the way points,—with the result that we have got a trustworthy text-book suitable both for students of law and for practising lawyers. The leading principles are not only succinctly stated, they are also illustrated by brief narratives of the cases in which they have been laid down. Here also we think the author has been successful in avoiding, on the one hand, the fault of merely referring to cases without any indication of what they are about; and, on the other, of entering at too great length into the details connected with some bogus company, with the view of popularizing the subject. The familiar form of address necessary in lecturing has wisely been kept within moderate bounds. As these lectures are accompanied by a capital table of contents and a good index, it is unnecessary to attempt to summarize them, but some idea of the extent and value of the field they cover may be indicated. The authorities cited range from Moses to Rettie, although fortunately the volumes of the latter greatly preponderate. We have the relation of the Memorandum of Association—"The Charter of the Company"—to the articles—"The Rules for its Internal Management"—clearly set forth under reference to the leading case of the *Ashbury Railway Carriage Company v.*

Riche, and the difference between an agreement to become a shareholder made with the promoters and one made with the company itself well illustrated by the recent Scottish case of *Molleson v. Fraser & Trustees*; but a portion of the opinion of the Lord President in the latter case might have been quoted with advantage. In discussing, too, the interesting question whether one is made a shareholder by the posting of a letter of allotment never received, answered in the affirmative in England under a vigorous protest from L. J. Bramwell, it might have been pointed out that Lord Shand lately expressed his sympathy with the dissent in the course of delivering the judgment of the Court in a case where the question was raised, but did not require to be solved.

In connection with the subject of administration we are furnished with a useful summary of the numerous cases about transfers of stock brought by shareholders of the City of Glasgow Bank, and also with a valuable summary of the duties and liabilities of directors, and of the remedies competent to shareholders who may have been induced to become members by fraudulent misrepresentations. Digests are given of such important Scottish cases as *Wishart, Macdonald's Trustees, Houldsworth, Tennent, Heiton v. Melrose Hydropathic* (not Peebles, which is a very recent institution), etc. etc.; and towards the end of the book we have such difficult matters discussed as compromises with liquidators, compensation between calls and debts (which is competent or the reverse, according as the company is not or is in liquidation), valuing and deducting of securities, preparation of a "B" list, liquidator's remuneration, etc. etc.

One great merit of the book is, that it for the first time provides us with a commentary on the Companies Acts founded as far as possible on Scottish decisions. We have also here and there suggestions as to the form in which petitions and notes to the Court should be drawn, which we shall doubtless see given effect to when the long-delayed third volume of the *Juridical Styles* appears, as we understand Mr. Lorimer has charge of the portion dealing with petitions under the Companies Acts. Such a collection will add to the completeness of these lectures, and will form a welcome companion for practical purposes.

The style of these lectures is clear, without being unduly discursive; but we fear Professor Masson might fall foul of the author for comparing companies in adversity to "*ropes of sand*," from which members, when apprehensive of loss, are fond of "*scuttling out*." We could point also to one or two slight inaccuracies in the text, and we have missed now and again a reference to the authority quoted, but we may expect to see such blemishes removed in the second edition, and they in no way affect the matter of these lectures, whose legal value reflects the greatest credit on their learned author, and ought to secure for them a wide circulation, especially just now, when so many are interested (or involved) in joint-stock companies.

Report of the Trial of the Glasgow Dynamitards before the High Court of Justiciary at Edinburgh, December 1883. By CHARLES TENNANT COUPER, Advocate. Edinburgh: William Green. 1884.

THIS is a very full and accurate report of a trial which certainly deserves to be specially commemorated, not only from the interesting nature of the evidence, but from the fact that the charge is the second only that has in Scotland been brought under the Treason Felony Act, the first being that against the Chartists, James Cumming and others, in 1848. The list of productions in the present trial comprised 128 articles, and the number of witnesses cited was 154, of which 77 were actually examined. The report in consequence was bound to be a pretty lengthy one, and we are not surprised to find that it fills about 250 closely-printed pages. Not the least interesting portion of the evidence is that of the scientific witnesses for the Crown, who describe with much clearness the nature and effect of the explosives used. The description of the formation of the conspiracy itself reveals many curious phases of human nature, and forms an interesting chapter in the annals of crime. The speeches of counsel, both for the Crown and for the defence, are given at full length, as is also the charge of the presiding judge, the Lord Justice-Clerk. Both speeches and charge have been specially revised by the Bar and Bench for this report, which itself will serve as an authoritative record of one of the most dastardly crimes that has disgraced the nineteenth century. We should recommend any of our readers who are interested in criminal jurisprudence to procure this volume without delay, as reports such as this are pretty sure ultimately to command high prices.

The Law of Industrial and Provident Societies, with the Provident Nominations and Small Intestacies Act, 1883, and Practical Forms. By W. J. S. SCOTT. Newcastle Co-operative Printing Society (Limited). 1884.

THIS is a reprint of the Industrial and Provident Societies Act, 1876, with a few annotations and cross-references interspersed. So far as it goes it may be of some use to secretaries of societies and others who may have occasion to consult the Act, but it is hardly the type of a well-constructed law book. Twenty-four cases are quoted in connection with various points raised under the Act, and the Treasury Regulations (without the forms) are also printed. The Provident Nominations and Small Intestacies Act, 1883, is given without comment, which perhaps in the circumstances was wise. We can hardly congratulate the printers on the general "get up" of the book.

The Month.

Report by Committee of the Faculty of Advocates on Bill to amend the Law relating to the Guardianship and Custody of Infants.—This Bill passed the second reading in the House of Commons on 26th March 1884. The Lord Advocate on that occasion, speaking for the Government, expressed an opinion adverse to the Bill as it stood. In this opinion, in so far as regards Scotland, with which alone they have to deal, your Committee concur. His Lordship's chief ground of disapproval was that there is no occasion for an alteration of the law in reference to the case where the parents are living together; and the clauses hereinafter suggested are framed to give effect to that view.

But as the Lord Advocate expressed his opinion that this Bill, so far as it did propose to remedy certain existing evils, could be made applicable to Scotland, and promised his assistance in doing this, your Committee considered its provisions with the view of aiding this object.

In order to accomplish this, the Committee are of opinion that the clauses of the present Bill should be limited to England and Ireland, and clauses applicable to Scotland should be added. Accordingly they recommend that the preamble should run, "Whereas it is expedient to amend the Law relating to the Guardianship and Custody of Infants in England and Ireland, and Pupils in Scotland;" that section 7 of the Bill should be omitted; and that in section 8 the words (line 17 of page 2), "In Scotland the Court of Session," should be deleted.

The clauses to be added they recommend should be as follows, viz. :—

§ . The above sections, except sections 1 and 9 (to be altered to 8), shall not apply to Scotland; and the following sections shall apply to Scotland.

§ . In the determination of any question between parents, where they are divorced or judicially separated, or are voluntarily living separate in breach of matrimonial duty, as to the custody of their pupil children the Court shall have regard not merely to the welfare of such pupil children in health, morals, and otherwise, but also, notwithstanding any rights of the father at common law, and so far as not inconsistent with the welfare of such pupil children, to the feelings and interests of the mother, provided she is not disqualified by reason of intemperate habits, or immoral conduct, or otherwise, from being a suitable custodier of such pupil children: And whenever the parents are divorced, judicially separated, or living separate, as aforesaid, and the Court is satisfied that the father is, by reason of intemperate habits, or immoral conduct, or otherwise, or having regard to the age of the child, an unsuitable custodier, or that he has without sufficient cause re-

moved or intends to remove such pupil child or children from the society of the mother: And when, in any of the above cases, the Court is satisfied that the interests and welfare of such pupil child or children will not be prejudiced by their remaining or being placed in the custody of the mother, the Court shall order that the mother shall have the custody of such pupil child or children, for such time, and subject to such regulations as to access by the father, as the Court may think proper: And further, the Court may ordain the father to pay such reasonable sum as they shall, in the whole circumstances of the case, from time to time fix, for or towards the maintenance, clothing, and education of such pupil child or children while in the mother's custody; and the mother shall be entitled to sue therefor in her own name.

§ . Any orders or decrees made by the Court in pursuance of this Act may be altered or modified upon the occurrence of new circumstances, and that in any process which has been already brought without the necessity of raising any new process.

§ . The word "Court" shall mean one of the Divisions of the Court of Session or a Lord Ordinary, according as the question is competently before the one or the other, and in vacation the Lord Ordinary on the Bills shall have the whole power of a Division of the Court, subject to review of the Court.

Before adjusting the clauses to be added, the Committee took into consideration the scope of the change proposed to be effected—the question raised being whether the change should be extended to all cases in which it is competent for the Court of Session to interfere, or limited to cases where there has been a decree of divorce or judicial separation, or an action of divorce or separation is pending. The majority of the Committee were of opinion that the change should be extended to all cases where the Court can at present competently interfere. A minority of two thought that it should be limited to cases where there has been a decree of divorce or judicial separation.⁹ The clauses as above given express the views of the majority of the Committee.

With regard to the guardianship and custody of pupils after dissolution of marriage by the death of the father, your Committee think that no occasion has arisen for any change.

GEO. H. M. THOMS, *Convener*.

THE ADVOCATES' LIBRARY,
EDINBURGH, 28th May 1884.

We dissent from the Report on the ground that the clauses proposed by the majority of the Committee interfere unnecessarily with a father's rights, and cannot fail to give rise to much litigation of a kind which our Courts have in the past wisely refused to entertain. As the law at present stands, a father will be deprived of the custody of his children if his conduct is such as to endanger their health or morals; but it makes very insufficient provision for

the protection of the mother's rights, where the husband, though kind to the children, has been guilty of serious conjugal misconduct, necessitating her withdrawal from his roof. In such cases it may fairly be held that the father has forfeited his rights as head of the family, and that these ought to be transferred to the mother.

Accordingly, where a wife obtains a decree of divorce or of judicial separation, she ought in our opinion to be found entitled to the custody of the children, unless the defender can prove that she is disqualified. And when an action of divorce or judicial separation at the instance of the wife has been raised, and is in dependence, the Court should be free to regulate the *interim* custody in such manner as they think best for the children and fairest to the spouses, having regard to such *prima facie* evidence as may be laid before them.

The Report from which we dissent goes beyond the lines indicated, and appears to contemplate that a father may be deprived of the custody in cases where he has not been guilty of conduct justifying a divorce or judicial separation, and has not disqualified himself by unkindness to the children. In other words, it will in future be open to a wife to withdraw herself from her husband's society and then to petition for the custody of the children, even though she does not allege that he has been guilty of adultery or cruelty towards herself, or that his conduct is such as to endanger the health or morals of the children. If she has deserted her husband merely from caprice, her application for the custody will probably be unsuccessful; though the innocent husband will have enjoyed the privilege of seeing his most private domestic concerns exposed to an appreciative public. But we may assume that in most cases there will be faults on both sides. How then is the Court to judge whether the husband or the wife is more in fault, and which is of the two the more suitable, or the less unsuitable custodian? In order to come to a decision the Court must make itself acquainted with the whole circumstances of the case, the character and temper of the spouses, the history of their wedded life, and the advantages which they can respectively offer to their children. For this purpose an inquiry will be necessary, in the course of which each spouse will lead proof as to the shortcomings of the other. It humbly appears to us that to allow litigation of this character would tend to weaken the bonds of family life, and that the disagreements of husband and wife are a subject upon which a Court cannot and should not adjudicate.

It has been objected that where the husband has been guilty of serious misconduct, the wife is entitled to a remedy without having to incur the scandal attendant upon an action of separation or divorce. The answer is that a wife, who petitions for the custody of her children on the ground that her husband has misconducted himself, must establish such misconduct by evidence;

and that the scandal is the same whether the proof be taken in the Outer House in the course of an action, or in the Inner House in the course of a petition.

HUGH J. E. FRASER.
WILLIAM CAMPBELL.

Legal Cricket—The Bar v. The Garrison.—This annual match, which has come to be looked on as one of the most interesting of the season, was played on the 23rd ult. As will be seen from the scores below, the Bar made a much more creditable appearance than they did last year. The popular Dean of Faculty was as usual the veteran of the Bar team, while a similar position was occupied on the opponents' side by Colonel Hay. A large and fashionable audience witnessed the match, which if it did not display any very scientific cricket, at least showed that the Parliament House was capable of holding its own with the Barracks. *Cedant arma togæ.* The band and the pipers of the Gordon Highlanders played during the game. Scores:—

THE BAR.

First Innings.

J. A. Gardner c Birkbeck b Macbean	27
A. G. Pearson b Macbean	99
C. K. Mackenzie c Simpson b Heygate	7
J. Patten c Wright b Richards	19
A. R. Duncan b Birkbeck	2
J. Reid c Bramley b Birkbeck	16
A. Stuart b Birkbeck	9
A. E. Henderson b Macbean	0
D. Lang c Hay b Birkbeck	4
C. C. Maconochie c and b Birkbeck	8
J. Wallace b Birkbeck	1
Dean of Faculty, not out	2
Extras	15
Total	209

THE ARMY.

*First Innings.**Second Innings.*

V. M. Birkbeck b Pearson	0	not out	40
W. Richards c Gardner b Henderson	1	b Lang	0
A. Williams b Mackenzie	5	c Mackenzie b Maconochie	10
G. Stanton b Pearson	0	not out	19
F. B. Simpson c Duncan b Mackenzie	21		
C. J. Maxwell c Gardner b Mackenzie	7		
Captain Heygate c Gardner b Mackenzie	8		
C. W. Fielden c Pearson b Mackenzie	3		
F. Macbean, not out	23	b Lang	7
— Bramley c Stuart b Pearson	0		
H. Wright c and b Mackenzie	16		
Colonel Hay b Pearson	3		
Extras	12	Extras	9
Total	99	Total	85

THE Benchers of the Inner Temple seem to carry the memories of their "salad days" even up to the Bench table. A masher student of that Inn, desirous to leave Hall early, on sending up his card to them, superscribed, "I have an important engagement to keep," received back as an answer, "She can wait."

LAYS OF THE LAW.

A HINT TO QUEEN'S COUNSEL.

'AIR:—*The Song of the Foster Brother in "Olivette."*

When the junior sits in trepidation
 With the case on the list for the day,
 The leader, to uphold his reputation,
 Gets his clerk to call him away.
 Then is the time for disappearing,
 Pick up your skirts, and off you go ;
 But when the time comes on for hearing,
 Bob up serenely from below.

But, if matters turn out badly,
 Or the evidence isn't quite clear,
 And you begin to recognize sadly
 That the case is looking queer,
 Then is the time for disappearing,
 Pick up your skirts, and off you go ;
 But when the jury round is veering,
 Bob up serenely from below.

And when deserted thus by you,
 The junior turns the current round,
 And shows the evidence is true,
 And that the points of law are sound.
 Then is the time for *re*-appearing,
 Pick up your skirts and back you go ;
 Since the sky above is clearing,
 Bob up serenely from below.

Or if you hear, while off you stray,
 The other side are bound to lose,
 Rush back quickly, and for judgment pray.
 But, if the Court should that refuse,
 Then is the time for disappearing,
 Pick up your skirts, and off you go ;
 And, if you see your client nearing,
 Say—"I always told you so." —*Pump Court.*

VACATION ARRANGEMENTS.—AUTUMN VACATION, 1884.

Bill-Chamber Roster.—The following is the rotation of Judges who will officiate on the bills in the Bill Chamber during the Autumn Vacation :—

Monday, July 21, to Saturday, July 26—Lord RUTHERFURD CLARK.			
" "	28,	" August 9	" LEE.
" August 11,	" "	" 23	" FRASER.
" " 25,	" "	September 6	" M'LAREN.
" September 8,	" "	" 20	" KINNEAR.
" " 22,	" "	October 4	" SHAND.
" October 6, to meeting of Court,			
	October 15	"	RUTHERFURD CLARK.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF CAITHNESS.

Sheriff THOMS and Sheriff-Substitute HARPER.

PACKMAN v. ROBERTSON.

Married Women's Property Act, 1881 (44 and 45 Vict. cap. 21, sec. 5)
—Confirmation—Executor Dative—Deserted married woman allowed to petition, and conjoined with other next of kin in office with declaration that husband's consent dispensed with in terms of above Act.

Mrs. Packman presented a petition for decree as executor dative *quâ* next of kin of her mother Mrs. Helen Gould or Robertson on this statement : That the petitioner has been living apart from her said husband for several years past, with the exception of a few months in the year 1882, and for the last twelve months she has had no communication whatever from him, and she is unaware of his whereabouts, but she believes he is somewhere in America.

That the petitioner during all the time which she has lived apart from her said husband has had to support herself by her own industry—her said husband never having contributed towards her support and maintenance.

That by section 5 of the Act 44 and 45 Vict. cap. 21, cited as the Married Women's Property (Scotland) Act, 1881, it is enacted that "where a wife is deserted by her husband, or is living apart from him with his consent, a judge of the Court of Session or Sheriff Court, on petition addressed to the Court, may dispense with the husband's consent to any deed relating to her estate."

A sister, Mary Robertson, thereafter presented a petition to be decerned executor dative, which the Sheriff-Substitute conjoined with the previous petition of Mrs. Packman. He thereafter decerned Mary Robertson as sole executor. Against this judgment Mrs. Packman

appealed, and after reclaiming petition and answers the Sheriff (Thoms) pronounced this interlocutor :—

“The Sheriff having resumed consideration of this appeal with reclaiming petition and answers, sustains said appeal, and recalls not only the interlocutors submitted to review, but the whole interlocutors *in causa*: Remits the petition of Mary Robertson to the previously presented petition of Mrs. Lizzie Robertson or Packman, and conjoins these petitions, and in the conjoined process grants the prayer of both petitions to the effect of decerning both the petitioners as executors *dative quid* next of kin of their mother the deceased Mrs. Helen Gould or Robertson designed in the petitions. Further, in terms of section 5 of the Married Women's Property (Scotland) Act, 1881 (44 and 45 Vict. cap. 21), dispenses with the consent of Andrew Garden Packman—designed in the petition of his wife Mrs. Lizzie Robertson or Packman—to all deeds and proceedings by the petitioner Mrs. Lizzie Robertson or Packman relating to her share of this executry: Finds the other petitioner Mary Robertson liable to the petitioner Mrs. Lizzie Robertson or Packman in the whole expenses of process, except the expense of the petition of Mrs. Lizzie Robertson or Packman and such other expenses as would have been incurred in an unopposed petition, and which will fall to be a charge on the executry estate as the same may be taxed according to scale I., and decerns.

GEO. H. THOMS.

“*Wick, 9th June 1884.*

“*Note.*—The Sheriff has not had the benefit of a note by the Sheriff-Substitute explaining his views in this very difficult case.

“The general rule is, that all next of kin who claim to be conjoined as executors *dative* are entitled to be so. It is said here that the first presented petition by Mrs. Lizzie Robertson or Packman does not admit of this being done, as it is presented by a wife without the consent or concurrence of her husband. But the Court of Session (Second Division) on 20th July 1883 sustained a petition by the wife alone on a statement of desertion very similar to that made here, in the case of M'Laren, 17th August 1883, noticed by Mr. Currie, Commissary Clerk Depute of Edinburgh, in his recent valuable book on *Confirmation of Executors*, p. 76. That case no doubt was under the Presumption of Life Act, but that does not seem to the Sheriff to prevent its being an authority as to a petitioner's title in a commissary case.

“In that case of M'Laren there was, as is here, a prayer to have a dispensation under the Married Women's Property (Scotland) Act, 1881 (44 and 45 Vict. cap. 21), with the consent of the deserting husband, and the Sheriff has granted the dispensation in the words of the interlocutor pronounced in that case of M'Laren.

“In the matter of expenses the petitioner Mary Robertson deserves no consideration. Her agents did not think it worth while to give anything but an ambiguous answer to the other petitioner's agent's first letters intimating the latter's intention to present a petition to be decerned executor, and at that time they did not ask to be conjoined in the office. Her uplifting and intromitting with £70 of the estate *sine titulo* must also be considered. The executry will by the Sheriff's finding of expenses be made liable to the expense of an unopposed petition, and the petitioner Mary Robertson must pay to the other petitioner the

balance of the expenses which have been incurred in the case through the position she has assumed in it both extrajudicially and judicially. The scale of taxation seems on the statement of both parties to be the lower one.

G. H. T."

SHERIFF SMALL DEBT COURT OF GLASGOW.

Sheriff CLARK and Sheriff-Substitute SPENS.

TOSH (DUNN'S TRUSTEE) v. HUNTER.

Cessio Acts of 1880 and 1881.—Held that a trustee under a disposition omnium bonorum was not preferable to a creditor who had used arrestments within sixty days of its date, and that a trustee on a cessio could not cut down arrestments in the same way as a trustee in a sequestration, the Cessio Acts not conferring the same powers on the trustee as those conferred on a trustee under the Bankruptcy Act of 1856. (See *M. T. Leckie, Watson, & Co. v. Robert Hunter and W. A. Dunn's Trustees*, reported in the current volume of this Journal, p. 222.)—This was an action raised in the Small Debt Court, Glasgow, at the instance of Robert Tosh, accountant, Glasgow, trustee for behoof of the creditors of William Archibald Dunn, against Robert Hunter, No. 6 Cumberland Street, Glasgow, for payment of £8, 14s. 10d., being a sum recovered by the defender under an arrestment used by him against William A. Dunn, and which the pursuer, as trustee on the debtor's cessio, contended was an illegal preference. The case was called before Sheriff Spens, who, looking to the fact that Sheriff Mair and himself had previously, under the same circumstances, pronounced different decisions—the one holding that the awarding cessio did, and the other that it did not, cut down arrestments—in such circumstances remitted the case to Sheriff Clark for his opinion. His Lordship, after having heard parties fully, has issued the following judgment:—

"The facts in the present case appear to be as follow: One William Archibald Dunn obtained on his own petition decree of cessio on 12th December 1883. Prior, however, to this, the defender, one of Dunn's creditors, arrested in the hands of Leckie, Watson, & Co., employers of Dunn, certain wages which they owed him, and then obtained under a decree of furthcoming payment to the extent of £8, 14s. 10d.; the arrestments were used on 24th October and 15th November 1883, and the money was paid on 3rd December following. It thus appears that though the proceedings in the arrestments and furthcoming were prior to the decree of cessio, they were within sixty days thereof. The present action is brought at the instance of the trustee in the cessio to compel the defender to pay over the said £8, 14s. 10d., as obtained by an alleged preference over the other creditors of the insolvent. Now, I have little doubt that this claim might be validly maintained provided the proceedings were in a sequestration, because under the 108th section of the Bankruptcy Act of 1856 special power is given the trustee to recover in such circumstances. The question for determination is—Does a similar power exist in the case of cessio? After full consideration, I have come to be of opinion that it does not, so long as the cessio has not been converted into a sequestration in terms of the Bankruptcy and Cessio (Scotland)

Act, 1881. My reasons for this decision are the following: The power which the pursuer claims the right of exercising is one among several peculiarities which have all along distinguished or differentiated sequestration from cessio; and like them is conferred on the trustee in a sequestration by special statutory provisions. By the Act of 1856, section 107, it is provided that, as regards heritage, 'the sequestration shall as at the date thereof be equivalent to a decree of adjudication of the heritable estates of the bankrupt for payment of the whole debts of the bankrupt, principal and interest, accumulated as at the said date, and when the sequestration is dated within year and day of any effectual adjudication, the estate shall be disposed of under the sequestration, according to the provisions of this Act: Provided that nothing herein contained shall affect the rights of any heritable creditor holding a power of sale preferable to the powers of the trustee.' Again, by section 108 it is provided, as regards moveables, that 'the sequestration shall, as at the date thereof, be equivalent to an arrestment in execution and decree of forthcoming, and to an executed or completed pouding; and no arrestment or pouding executed of the funds or effects of the bankrupt on or after the sixtieth day prior to the sequestration shall be effectual; and such funds or effects, or the proceeds of such effects, if sold, shall be made forthcoming to the trustee: Provided that any arrester or poudier before the date of the sequestration who shall be thus deprived of the benefit of his diligence shall have preference out of such funds or effects for the expense *bona fide* incurred by him in such diligence.' These provisions and powers are of a special and very extensive kind, and have in point of fact been in some form or other possessed by trustees in sequestrations ever since that mode of winding up a bankrupt estate assumed its present form. In the Cessio Acts, on the other hand, all these provisions and powers are conspicuous by their absence as applying to cessios. The Cessio Act of 1836, 6 and 7 Will. IV. ch. 56, though it greatly improves the process of cessio, does not incorporate any of the provisions or powers above mentioned. They are thus conspicuous by their absence. In like manner the recent Cessio Acts of 1880-81, though further extending the functions of cessio so as in some senses to assimilate it to sequestration in the case of small estates, do not transfer the powers above mentioned to cessio while remaining such, but still leave the two processes of sequestration and cessio to be worked out on their own lines respectively. And this seems to me to dispose of the argument which was strongly urged for the petitioner, that the cessio being in many respects assimilated to sequestration as a means of winding up small estates, it may be assumed that the provisions specially conferred in sequestration are to be extended by implication and analogy to cessio. It must be kept in view that sequestration and cessio are alike the creatures of statute, and that if the Legislature had intended that a trustee in a cessio should have the same powers as a trustee in a sequestration, nothing would have been simpler than to have declared this in one or other of the recent Acts. Now, so far from this being the case, there is a provision in the Act of 1881 which seems, by necessary implication, to exclude any such intention. By that Act power is conferred on the Sheriff to convert a cessio into a sequestration when the liabilities exceed £200, and when he deems that course expedient; and it goes on

to provide that after that conversion has taken place—and not before—the whole provisions of the Bankruptcy Acts shall apply as from the date of the proceedings; from which it necessarily follows that these provisions, including those in question, do not apply so long as the process remains one of cessio. When, indeed, the matter is duly considered, there seems very good reason why the provisions in question should not apply to mere cessios. The new cessio, like the old imprisonment, in place of which it comes, may be awarded for recovery of a small-debt decree; but if the provisions in question were to be extended to cessios, very startling results would follow. Creditors who had led adjudication for large debts, but in whose case the year and day had not elapsed, would be liable to have their adjudications disturbed; and those who, as in the present case, had obtained payment of undoubted claims by arrestment or poinding, and had the money in their pockets, would be required to hand it back to the trustee, and be exposed to all this disturbance and annoyance, not, as in a case of sequestration, in order that a large estate should be ingathered and equally distributed, but in order to enforce payment of a small-debt decree for a few pounds. Such results appear to me to be too startling to rest on mere implication, and to be such as could only be legalized by special enactment. It would thus seem that the non-application of the provisions in question to cessios, so far from being a disadvantage, is a positive advantage to the general body of the creditors. It must also be always borne in mind that wherever the debts exceed £200, the Sheriff has power to convert the cessio into sequestration, and any creditor with a debt of £50 may obtain sequestration notwithstanding cessio has been awarded. So that it is difficult to conceive any case in which the absence of the provisions in question in the case of cessio could involve any prejudice to the rights of creditors. For these reasons judgment is given in favour of the defender."

Act. John Stuart & Gillies—Alt. Wallace & Wilson.

Notes of English, American, and Colonial Cases.

BASTARDY.—*Jurisdiction—Service in Scotland of summons issued in England—Bastardy Laws Amendment Act, 1872 (35 and 36 Vict. c. 65), ss. 3 and 4—Summary Jurisdiction Act, 1879 (42 and 43 Vict. c. 49), ss. 51 and 54—Summary Jurisdiction (Process) Act, 1881 (44 and 45 Vict. c. 24), s. 6.*—Where a bastardy summons which has been issued by a justice of the place where the woman resides in England has been endorsed by a Court of Summary Jurisdiction in Scotland and served in Scotland on the defendant who is there resident, the justices in England have no jurisdiction to hear and adjudicate upon the summons, notwithstanding that the defendant appears before them by a solicitor who objects to the jurisdiction.—*Reg. v. Thompson (App.)*, 53 L. J. Rep. M. C. 65.

BUILDING SOCIETY.—*Mortgage—Arbitration—Building Societies Act, 1874 (37 and 38 Vict. c. 42), s. 16, sub-s. 9, ss. 34, 35, and 36—Jurisdiction of High Court.*—A building society formed under the Building Societies Act, 1874, and having in accordance with section 16, sub-

section 9, a rule requiring all disputes between itself and its members to be settled by arbitration, sued an advanced member upon covenants contained in a mortgage. On a summons taken out by the member to stay proceedings—*Held* (by Lord Blackburn and Lord Watson; *disentiente* the Earl of Selborne, L.C.), that the jurisdiction of the Court was ousted, and that the matter must be referred to arbitration under the rule.—*The Municipal Permanent Investment Building Society v. Kent*, H. L. 53 L. J. Rep. Q. B. D. 290.

CHARTER-PARTY.—*Bill of Lading—Incorporation of terms of charter-party—Cesser clause—Demurrage—Port of discharge.*—Goods were shipped on board the plaintiff's ship under two bills of lading, by which they were made deliverable at the port of discharge to the defendants or their assigns, "they paying freight and all other conditions as per charter-party." The charter-party, which was entered into by the defendants as charterers for account of another party, stipulated for payment of freight and demurrage, and also that the liability of the defendants as charterers should cease as soon as the cargo was on board, the vessel holding a lien upon the cargo for freight and demurrage. In an action against the defendants, as consignees of the goods, for demurrage incurred at the port of discharge—*Held*, that as the cesser clause in the charter-party was inconsistent with the contract contained in the bill of lading, it could not be incorporated into the bill of lading, and consequently, that the defendants as consignees were not absolved from liability for demurrage incurred at the port of discharge.—*Gullichsen v. Stewart Brothers* (App.), 53 L. J. Rep. Q. B. D. 173.

Judgment of the Queen's Bench Division (52 Law J. Rep. Q. B. 648) affirmed.—*Ibid*.

CRUELTY TO ANIMALS.—12 and 13 Vict. c. 92, ss. 2 and 29, and 17 and 18 Vict. c. 60, s. 3.—*Domestic animal—Decoy bird.*—Linnets caught, kept in captivity, and trained to act as decoy birds for the purpose of catching other birds, were treated with cruelty—*Held*, that they were "domestic animals" under the protection of 12 and 13 Vict. c. 92, ss. 2 and 29, as amended by 17 and 18 Vict. c. 60, s. 3.—*Colam v. Pagett*, 53 L. J. Rep. M. C. 64.

SOLICITOR.—*Fiduciary position—Advances made by a solicitor to buy up incumbrances created by client—Rate of interest on advances.*—The plaintiff had mortgaged her life interest in certain leasehold property to various persons. In the year 1880, the defendant, who was then acting as her solicitor, in order to release her from embarrassment, bought up several of the incumbrances with his own money, and took a transfer of them to himself—*Held* (in an action for redemption brought by the plaintiff against the defendant), that the defendant must be allowed interest at the rate of five per cent. on the moneys he had actually advanced.—*Macleod v. Jones*, 53 L. J. Rep. Ch. 534.

There is no rigid rule as to the rate of interest which the Court will allow in such cases.—*Ibid*.

THE JOURNAL OF JURISPRUDENCE.

THE DECLINE OF LITIGATION IN THE COURT OF SESSION—A SUGGESTED REMEDY.

NOWADAYS it is a common complaint in the Parliament House that the business of the Court of Session is on the decline. How far this complaint is well founded, it is difficult precisely to ascertain. A year or two ago, when it was proposed to reduce the number of judges, statistics were brought forward to prove that so far from there being a decline of business, litigation was increasing at a most satisfactory rate. It was shown incontestably that the number of cases in 1880 was largely in excess of those brought into Court in 1870, and what could be a more obvious inference than that if the judges were fully employed before, they must now be over head and ears in work. On the strength of such statistics, backed by the popular opposition which was successfully awakened, the Government were induced to abandon what was on many grounds an ill-considered Bill, and the Faculty of Advocates were again at liberty to growl at the compromising spirit amongst litigants, and the miserable profits of the junior Bar.

The immediate recurrence of the complaints is sufficient evidence that the statistics relied on to checkmate the Government proposal were not so conclusive as the uninformed public might have imagined. In the statistics (if I recollect rightly) no comparison was made of the relative number of undefended cases in the years which were contrasted, nor was there any attempt to ascertain how many of the actions brought into Court had got the length of proof or judgment. And yet, in order to form an opinion as to whether the actual work of the Court of Session had increased or declined during the past decade, it is obvious that information of this kind was essential. Such information the Faculty had practical means of obtaining, and I suspect that it did not justify the cheerful contempt with which they affected to entertain the proposals for a reduction of the number of judges. To many the

statistics must have come as a joyful surprise—as a new and plausible argument for which they had scarcely hoped, and beneath the triumphant exultations with which the statistics were appealed to, there must have been a lurking fear lest they should be subjected to any searching analysis. At all events, when from all quarters one hears complaints of the decline of litigation, when idle seniors and despondent macers alike join in vain regrets of the proofs and trials of former days, and when one looks at the legionary tribes of juniors unemployed and without immediate prospect of employment, one is disposed to infer that, however much interested grumblers may exaggerate, their complaints contain a substratum of fact.

But while complaints are numerous, remedies are not forthcoming. To some extent a decrease of certain kinds of litigation is the inevitable result of increasing enlightenment and improved means of communication. Questions of fact can often now be solved before proof, which formerly, in consequence of the hopeless contradictions of ignorant witnesses and the difficulty of having them properly precognosed, could only be settled by judicial assistance. Again, the reform of judicial procedure and the removal of tedious delays in the decision of cases have all but swept away the race of *mala fide* litigants who defended actions simply to gain time. In the same way, increased simplicity in the forms for the transfer of heritage has operated a considerable reduction in the number of intricate and technical questions of conveyancing which occupied so much of the time of the Court of Session prior to 1868. In fact, as education and civilisation advance, as law is brought more and more into conformity with justice and common sense, and as precedents are multiplied and established, the tendency is inevitably towards a decrease of litigation. The lawyer's art is thus necessarily suicidal. The greater perfection which through his efforts the law attains, the less will its rules be disputed; the more rapid and effectual the means by which it is vindicated, the fewer attempts will there be to delay or defeat its execution. Thus, as the human race journeys towards perfection,—a goal which fortunately for the profession is yet at some distance,—it will dispense more and more with its lawyers, until it drops the last at the gateway of the millennium.

The above causes of the decrease of litigation are inevitable in their operation so long as culture and morality continue to advance. But there is one cause to which I desire to draw attention in this paper which more than all the others has prevented a legitimate increase of the business of the Court of Session; and that is the great expense that litigation as now conducted involves. This operates as a deterrent in two distinct ways—(1) In the heavy burden which is thrown on the losing party, and of which both run the risk: (2) In the tax which the extrajudicial expenses constitute upon success.

It is more especially in causes of no great pecuniary value that a consideration of the probable cost of litigation operates so as to prevent resort to the Courts of law. In cases involving large sums the costs do not form such an important factor; and this is to a certain extent also true of those actions which are the outcome of personal animosity. But in the majority of mercantile cases, which form at the present day a large and increasingly important source of business in the Court of Session, the expense of obtaining a judgment, and the loss consequent even upon complete success, are a most effectual means of burking many a hopeful lawsuit. Viewed from a commercial standpoint, there is scarcely any contested claim under £100 which is worth the risk of fighting. If you win, you will lose perhaps a fourth or more of your claim (in extrajudicial costs); if you lose, you not merely lose the sum in dispute, but three or four times its amount in expenses. There is no mercantile speculation in which reasonable people embark that involves anything like the hazard of a litigation, when thus viewed in the double light of possible gain and certain loss. A man would need to be very much convinced of the justice of his cause before he would submit to risks which are proportionally so enormous; and it is not to be wondered at if mercantile people, accustomed to calculations of profit or loss, should rather sacrifice half of a disputed claim than risk three or four times its amount in trying to enforce it. To the foreigner the costs of British litigation are so well known that he will accept almost any compromise rather than resort to our Courts of law. With him as a rule the question is a mere matter of money; he has no pique to gratify, no wounded vanity to assuage that might tempt him to have a shot at his adversary; and therefore, with the wisdom begotten of past experience, he submits to gross injustice in preference to appealing to the law of a country about which he knows nothing except that it is extremely expensive to put it in operation.

I do not wish to exaggerate, and therefore I pause here to verify my premises. And first as to the expense of obtaining a judgment, agents will bear me out when I say that the cost of obtaining the opinion of a Lord Ordinary in a case involving a single day's proof is from £100 to £120 a side, and for each additional day's proof you may add at least £30. So that when you have a pecuniary stake of no more than £50, requiring a two days' proof, the unsuccessful litigant may be subjected in £300 of expenses, or 600 per cent. of the amount originally at stake. Then as to the number of cases in the Court of Session which really involve no more than £100, I think it will not be disputed that they form a very considerable proportion of the whole. I have been told that of the cases containing simple pecuniary conclusions (apart from actions of damages, which are always nominally stated at about five times their value), about one half

relate to sums less than, or at all events not much over, £100; and I am disposed to believe that the statement is not much exaggerated.

But then the question arises, to what extent would business be increased were the expense of conducting actions diminished? Of course, the answer to this can only be matter of pure conjecture. My own opinion is, that if the diminution were substantial, the number of litigated questions in mercantile and shipping law would be at least doubled. I shall give only one illustration of the class of cases on which this opinion is based. In a mercantile community such as ours, no disputes are more common than those arising from the detention of ships; yet it is seldom that the amount at stake exceeds £100; indeed, in most of the decided cases in Scotland and England the sums sued for were considerably less. Yet, though these disputes arise every other day, scarcely one per annum comes under the cognisance of the Inner House. What is the explanation? Not that the law is well settled, for there is a host of questions still undecided; not that there is a want of difficulty in adjudicating on the facts, for mutual accusations of fault are not easily expiscated; but simply that the sums are too small to stand the risk of a Court of Session litigation. Hence few of these cases are ever brought into Court, and of these few nearly all are settled before they have advanced beyond the initial stages. In the remaining half dozen per annum (to take a liberal estimate) which hazard a judgment from the Lord Ordinary, one or two of which only reach the Inner House, you have the pleasing conviction as you part from your client, that whether successful or not, he won't be in a hurry to repeat the experiment.

This matter of reducing expense in litigation is really one of public concern, but hitherto I have looked at it solely from the narrow standpoint of professional self-interest, with the view of removing the prejudices which exist in favour of high charges. The practical object of this paper is to point out some of the directions in which expense might be diminished without interfering with the proper conduct of the cause. The following suggestions, if carried out, would, I think, meet the requirements of the case:—

1. The adoption, except on special cause shown, of a lower scale of charges in all cases in which the sum involved was less than £100. This is in accordance with our own Sheriff Court practice, and also with the recently framed rules of the Supreme Court in England. According to the latter, the question as to what scale is to be adopted in taxing costs is left to the discretion of the judge; and if the case be one of difficulty or importance, the higher scale may be allowed.

2. The employment of only one counsel in the Outer House in cases under £100, subject to a similar discretionary power in the

judge to allow the expense of two counsel in cases of difficulty or importance.

3. In cases where less than £25 is recovered, the unsuccessful party should only be subjected in Sheriff Court expenses. A similar rule, substituting £50 for £25, has been introduced in England. The effect would be salutary in keeping out of Court trumpery actions of damages, which should properly be dealt with in the Sheriff Courts.

4. The accounts recoverable for printing should be limited to the actual amount paid by the agent to the printer. It is well known in the profession that accounts for printing which are charged in full against the litigant include a commission of from 25 per cent. to 40 per cent. to the agent. This does not appear in the accounts themselves, for in these the full amount is entered under the head of outlay. But for the fact that the practice has been so long followed and is so generally recognised, the profession could not long have been blind to its really reprehensible and degrading character. If it were not a "custom of trade," but were only followed by the less reputable members of the legal bodies, it would long since have been declared illegal; and it is difficult to see how the morality of the practice is improved by the fact of its being general. If the fees allowed for revising prints are not adequate, provision may be made for additional charges; but whether or not, agents should have the courage to abandon a charge which they would not care to state openly, and which can plead no higher sanction than prescription. If they did so they would probably find their temporary sacrifice more than compensated by the increase of appeals from the Sheriff Courts, which as matters now stand are often prevented by the great expense incurred in printing the record and proof.

The above suggestions might readily be given effect to by an Act of Sederunt, and if so, could not fail materially to reduce expense in cases of small pecuniary importance. If a substantial difference were made between the lower and the higher scales, it should become possible in the cases to which the former applied to obtain a judgment in the procedure roll for £25 a side, and a judgment after a one day's proof for about £50. Were this effected litigation would cease to be ruinous, and many litigants who now compromise owing to its enormous cost, would cheerfully risk a relatively heavy but well-defined liability for costs for the sake of obtaining a judicial opinion.

With regard to extrajudicial expenses any regulations would be quite impracticable. No doubt in many cases some extrajudicial expense is unavoidable. Witnesses are precognosced who turn out to be of no materiality, or whom counsel in the exercise of a fallible discretion refuse to adduce. So, too, there may be consultations and correspondence with the client which are, strictly speaking, not sufficiently remunerated by the instruction fee, and

in various other ways items may accumulate which one fails to recover from the opposite party. Yet, though many excuses may be framed for the extrajudicial account, it is essentially indefensible. What is it but a record of mistakes made in the course of the litigation? All the expense which was necessary for the proper and judicious conduct of the cause is recoverable from the losing party; the extrajudicial expense represents labour or money needlessly thrown away. Each item tells the client where his agent has committed a blunder—it may be from excess of caution, but a blunder nevertheless. Viewed from this standpoint, the extrajudicial account is a document which the able practitioner should blush to present.¹

If extrajudicial charges were simply suppressed, more especially in cases of small pecuniary stake, I think it would not be to the disadvantage of the agent in the long run. Nothing exercises such a deterrent effect upon healthy litigation as the pursuer's knowledge that when he recovers his claim part of it will go into his lawyer's pocket. A man strong in the conviction of the justice of his case will risk £500 in order to recover £100 if he is sure when he succeeds that he will get the £100 clear; but if he reflects that his agent may have an indefinite claim for extrajudicial costs, and the adversary offers £50 in full, he will be a bold man who does not sacrifice justice to expediency by accepting the compromise.

After all, where is the necessity of the extrajudicial account? The charges passed by the auditor are quite in the nature of fair remuneration for the work done in the great majority of cases. Speculative agents will conduct three litigations if they are certain of being remunerated in one, and though firms of high professional standing, but with a small amount of Court work, may not find it remunerative, a special rate cannot be devised for them. I have known many litigations to have been conducted to final judgment in the Inner House where not a shilling was charged for extrajudicial costs; but this happens mainly with firms which have a large mercantile connection, and have been perforce imbued with the mercantile spirit.

There is one class of theorists with whom the views above expressed will not find favour. According to them, a heavy bill of costs is a most useful discouragement to litigation,—a state of things for which they entertain the profoundest dislike. In their view the unsuccessful litigant is a quasi-criminal, who deserves and more than deserves all the punishment imposed upon him in the shape of liability for expenses. He is a defaulter who has put an honest man to a great deal of trouble to recover his due; or he is a wicked person who is preferring a totally unfounded claim in

¹ These remarks are not applicable to cases in which it is necessary to employ skilled evidence, whose fees often require to be much in excess of what the auditor allows.

the hope of extorting money by having recourse to the quirks and subtleties of the law. Are not such persons, they ask, rightly served when they are heavily mulcted in costs; and will not a single experience of the kind exercise a salutary deterrent influence upon them for the future?

If the premises were sound, there is no valid objection to the conclusion. But persons of any practical experience in litigation know that very few litigants belong to the two classes above described. In contested cases both parties generally believe that they are in the right, and as a rule have very good grounds for so believing. Were it otherwise, a case would not be arguable. Is it not then a grievous hardship that a man should be ruined—as is too often the case—for a mere error of judgment, an error which is shared by his legal advisers, and it may be by two of the five judges that decide his case. Can it be said that his crime is at all commensurate with his punishment; or that it is inexpedient to seek to minimize what is unfortunately the necessary penalty of mistake?

But there is a still graver objection to this view. The persons who profit by the great cost of enforcing and defending claims in the Court of Session are precisely those *mala fide* litigants who most deserve to be punished. The power of putting a pursuer to great expense in enforcing his claim is a dangerous weapon in the hands of a wealthy defender, and still more so in the case of one in bad credit. He can and often does use it as a means of coercing his creditor into accepting less than his due. On the other hand, a poor pursuer, unable to pay a farthing if he loses, frequently succeeds in extorting money on an unfounded claim by threatening to put his opponent to the expense of a lawsuit. Thus the great expense of litigation becomes a successful instrument of oppression or extortion in the hands of the very persons whom it is supposed to punish.

It follows from the above that it is a matter of public interest that the expense of lawsuits should be diminished, *in so far as that can be done consistently with the efficient administration of justice*—a proviso of great importance, although too often overlooked by people outside the profession. The first essential of a judicial decision is that it should be sound; but soundness can only be obtained when parties are ably represented before an able tribunal. A bad decision, however cheaply it may have been obtained, will be the dearest in the long run to the public, for its authority will be questioned until a reversal is secured. On the other hand, a well decided case is a precedent which obviates many disputes that but for it would have created a deal of bad feeling. The litigant who fights a question of principle is thus really a public benefactor, one who (whatever his motive) risks his property to obtain a decision which shall form a guide to posterity—a peace-maker whose happy influence extends far

beyond the term of his natural life. The most litigious nations are as a rule those which are most intelligent, and possess the most highly developed systems of law.

In the suggestions which I have made for cheapening procedure in causes of small value, I have kept in view the necessity of not thereby impairing their efficient conduct. I should regard a system which rendered judgments cheap by a sacrifice of their soundness as a greater misfortune to the public than that which now exists, however ruinous its operation may be to the individual litigant.

THE "ORDINARY MACERS" OF THE COURT OF SESSION.—III.

(Continued from p. 361.)

THE macers of the Court of Exchequer may next properly be considered at this stage of our inquiry. Their salary, it is mentioned in the Sixth Report of the Royal Commissioners, was at first £80 a year each, but this appears to be an erroneous statement, as the sum stands in all the Establishments from Queen Anne to George III. at £50, and the mistake has probably arisen from some confusion with the Marshal of the Court of Exchequer, who received the exact sum mentioned in the Report. Somewhere about 1810 the sum was increased to £100, and thus stands in the Establishment of George IV. Their fees averaged £30.

By the Act 55 George III. cap. 42, which established the Jury Court in Scotland, three new macers were added to the number already existing (section 38). That Act had proceeded upon the recommendations of a Royal Commission of 1810, but as legislation in this direction was deemed experimental, the Act was continued only "for seven years from its date and to the end of the then session of Parliament" (section 45). These Jury Court macers were specially prohibited by the statute from "taking any fees whatever in "respect of the business" of their office, and their salary, as may be learned from the Establishment of George IV., was £100 per annum. We have now reached, in 1815, the period at which the staff of macers about the various Courts of Law had attained its maximum, whilst the special fees and privileges of the macerships, at least of those which had been established for some time, though threatened, yet remained intact. At this date there must have been

Four Macers of Session, each with £10 salary	
and fees, £169	=£716
Three Macers of Session (additional), at £120	
each	= 360
Two Teind Macers, with fees averaging £38	
each	= 76

Three Justiciary Macers ; salaries, £105 ; fees,
£85 each = £570

Three Exchequer Macers ; salaries, £100 each ;
fees, £30 = 390

Three Jury Court Macers, salaries, £100 each . = 300

In all, eighteen macers, drawing from one source and another among them over £2400 a year.

From this time onwards the palmy days of macerdom were doomed to fade away, and the searching eyes of Royal Commissioners soon began to decimate their number and reduce their emoluments. The Reports of the Commission bore fruit in the shape of the Act 1 and 2 George IV. cap. 38, which introduced sweeping changes. Under the 28th section the whole of the fees of the macers were to be paid over and accounted for weekly to the collector of the fee fund, and "with all gratuities receivable by them, or any of them, in their capacity of macers, form a common fund of division among the whole seven macers," who were also to receive each a salary of £120 a year. There is also a provision by which the "fees now legally exigible by the two macers of the Court of Teinds (being also macers of the Court of Session) shall in like manner form a common fund of division among the whole seven macers, who shall all equally be liable to perform the duty of macers without distinction, whether in the Court of Session, Court of Teinds, or elsewhere." This certainly looks like merging the two Teind macers in the seven already attached to the Court, and it further seems that the practice of one person holding both offices was not unknown. We are, however, met by a difficulty in the occurrence of a document in the Teind Office, dated 1828, or seven years later than this Act. This is a petition by James Rae, one of the macers of the Court of Session, setting forth the death of Alexander Blaikie, "one of the two macers of the Court of Teinds," and Rae "humbly proposes himself to act in room of the said Alexander Blaikie," and along with Robert Moffat, the other macer, to "enjoy all the privileges and emoluments of his office, and that during his lifetime." There is no reference whatever to a Crown appointment, or to the provisions of the Act we have mentioned, which the proposal of the petitioner appears directly to contravene. It may be added as an interesting example of the close freemasonry of all Court officials in those days that the petition itself is written by a clerk of the Court of Teinds, and the very same hand appears in the deliverance approving the request, which is signed by Lord President Hope. There can, however, be no doubt that in a few years the operation of this clause had swept away the two remaining Teind macers, of whose very existence, so far as we can gather, the petition of James Rae is the last trace on record.

It was not, however, only in their number and in their fees that this Act of 1821 struck at the macers of the Court ; it also with-

drew from them a privilege of quasi-jurisdiction, amounting to a dignity. Perhaps the greatest peculiarity of these proceedings, which were of a judicial nature, is to be found in the fact that they were entirely unconnected with any of the ordinary duties of the macer's office. These duties of the macers were connected with the special writs issuing from Chancery, and termed *briefes* for the service of heirs by inquest. In the original form the *briefe* was addressed to the Sheriff, Bailie, or Judge Ordinary of the particular district in which the lands lay, but as time went on it was found inconvenient where a person was to be served heir to lands in several jurisdictions that a separate *briefe* should issue for each, and a custom arose of directing these *briefes* to the macers of the Court of Session. So long had this continued that it was actually believed by some lawyers that macers possessed an inherent jurisdiction, until Erskine exposed the fallacy, by showing that their authority proceeded from the fact that in the Commissions issuing to them from Chancery upon the warrant of the Court of Session, they were specially appointed as "judges in that part." So also messengers as sheriffs "in that part" were judges in apprising. We have before us an old *briefe* which commences in the following terms:—"Hæc inquisitio facta fuit in Nova Sessionis domo Edinburgi duodecim die mensis Septembris, anno Domini Millesimo Octingesimo Decimo Sexto, coram Roberto Moffat et Gulielmo Cunningham, Duobus e quatuor clavigeris ordinariis coram Dominis concilii et Sessionis, Vicecomitibus in hac parte, etc." Moffat, the macer here named, in 1816, may be the same person referred to as a Teind Macer in 1828, as already mentioned. The Royal Commissioners in 1816 had pointed out that in this peculiar form of procedure the limit of absurdity was by no means reached in assigning preposterous duties to these servants of the Court, for in one respect it actually led to the Supreme Judges sitting, not to decide a cause, but to act as legal assessors to their own macers, who were truly the possessors of the judicial function. To explain this we may point out that when the Court directed the issue of a *briefe* addressed to the macers of the Session it was usual, in the event of any question of legal procedure arising, to appoint two of its own number to be present for the purpose of directing the proceedings. "The macers, whatever responsibility may be transferred from them to the Honourable Persons who sit as their advisers, are, in a proper sense, the Judges of the service; and the return made under it, and which is the result of the whole proceeding, is the act of these officers alone." The Report further says that "the form is ill-contrived for the determination of a judicial case, and, in appearance at least, it derogates not a little from the dignity of the supreme tribunal." Sir Walter Scott in "Guy Manuering" alludes to this peculiar court, where he describes the way in which Counsellor Pleydell got Bertram served heir. The passage may

be quoted, as it is not very long, and admirably illustrates our narrative. Colonel Mannering asks Pleydell, "Well, have you carried through your law business?" "With a wet finger," answered the lawyer; "got our youngster's special service retoured into Chancery. We had him served heir before the macers." "Macers? Who are they?" "Why, it is a kind of judicial saturnalia. You must know that one of the requisites to be a macer or officer in attendance upon our supreme court, is that they shall be men of no knowledge." "Very well!" "Now, our Scottish legislature, for the joke's sake, I suppose, have constituted those men of no knowledge into a peculiar court for trying questions of relationship and descent, such as this business of Bertram, which often involves the most nice and complicated questions of evidence." "The devil they have! I should think that rather inconvenient," said Mannering. "Oh, we have a practical remedy for the theoretical absurdity. One or two of the judges act upon such occasions as prompters and assessors to their own doorkeepers. But you know what Cujacius says, '*Multa sunt in maribus dissentanea, multa sine ratione.*' However, this saturnalian court has done our business; and a glorious batch of claret we had afterwards at Walker's—Macmorlan will stare when he sees the bill." By the 11th section of the Act of 1821 all this was abolished, and it was enacted that such briefs were in future to be issued to the Sheriff-Depute of Edinburgh or his Substitute—but without the necessity formerly imposed upon the macers of taking the oath *de fidei administratione*.

Before the year 1830 the experiment made fifteen years before in the establishment of a Jury Court in Scotland upon the English model, had shown itself to be clearly a failure, and the Act 1 and 2 William IV. cap. 69 was passed in order to abolish the anomaly thus created, and merge the Jury Court in the ordinary work of the Court of Session. There were, however, as we have seen, three Jury Court macers with salaries of £100 each, and these are specially dealt with by sections 12 and 13 of the statute which continued them in the discharge of their duties in the Court of Session, but provided that, "as vacancies shall occur in the office of macer, the number of macers shall be reduced, so that they shall not exceed the number of macers officiating exclusively in the Court of Session at the passing of this Act." By the year 1834, when the first report from the Law Commissioners made its appearance, there had already been one macership thus merged, and thus then there were nine, of whom seven enjoyed £120 of salary, and two, formerly in the Jury Court, each £97, 10s. They had also perquisites on admission of advocates, etc., amounting on an average of £16 a year more. The Royal Commissioners say in their report (p. 29), "We do not propose to interfere with the emoluments received by them from this last source, but we cannot lay it out of view in estimating the general amount of their

remuneration; and considering that they are not employed in vacation, and that there is no occasion for their services except when the Court is actually sitting, we are of opinion that the present rate of salaries is too high, and that in future it should not exceed £100, exclusive of the other perquisites to which we have just alluded. The recommendations of this report received legislative effect under the Act 1 and 2 Vict. cap. 118, which, *inter alia*, enacted that, "as vacancies occur, the salaries allowed to each of the macers of Court shall be limited to £100 *per annum*."

There still remained the separate Court of Exchequer with its staff, including three macers; but already in 1832 an Act had transferred to the Commissioners of Land Revenues the management of the Hereditary Land Revenues of the Crown in Scotland, up to this time regulated by the barons of Exchequer, and gradually, under succeeding Acts, this Court disappeared, through the transference of its functions, and the rearrangement of its offices, until in 1856 the Act 19 and 20 Vict. cap. 56 completely merged the Court of Exchequer in the Court of Session, abolishing by section 45 "the offices of attornies or sworn clerks and macers" of the Court of Exchequer, as at present constituted.

We have thus brought down the history of the macerships to a date at which they assumed the shape they still retain. Seven macers of Court, each at £100 a year, filled the places formerly occupied by no less than fifteen officers of the same class, and even these seven were not, we may say are not, by any means overburdened with the duties referable to their office. But although it is evident, from the Report of the Commissioners in 1834, that they contemplated the abolition of all fees and all emoluments except those perquisites expressly referred to by them, and notwithstanding the fact that the Act 1 and 2 Vict. cap. 118, by section 28, expressly enacted that the fees contained in a schedule annexed to the Act, "and all other fees, dues, and perquisites payable to the clerks or officers of Court, are and shall be abolished," the macers appear to have considered the statute as not applicable to themselves, as we shall presently see. With one voice they claimed to be in its important sense "officers of Court," and yet in its pecuniary disability not so. Nothing could well be wider than the words we have quoted, but nothing also could in those days have been further apparently from the minds of the macers than that anything could possibly be intended by the Legislature so outrageous, so utterly devoid of the proprieties of that society in which they moved, as to contemplate the possibility of a macer's existing without getting "fees and perquisites" wherever he could lay his hands upon them. Certainly the fact stands upon record that in 1860 the record was closed by Lord Ardmillan, Ordinary, in an action of declarator at the instance of Charles Green, Thomas Blackie, Francis Garden Caird, James Turnbull, Louis

Hoffner, Alexander Temple, and Alexander Cannon, the macers of the Court of Session, by this time reduced to their statutory number, against Walter Stewart, Superintendent of Court Buildings. They prayed for decree "that the fees payable upon each occasion of the use of the Seal of Court of our said Lords, to the extent of 5s., belong exclusively to the macers of the said Court, as part of the emoluments pertaining to their said office, and that the pursuers, as the present macers and holders of said office, have the sole and undoubted right and title to receive, uplift, and discharge the said fees to the extent foresaid; or otherwise, that upon the said fees to the extent foresaid being collected by the Keeper of the Seal, that the pursuers are entitled to receive from him payment to the extent of 5s. upon each occasion of the use of said Seal;" and there was a conclusion for declarator that the defender Stewart had no right or title to this 5s., and that he should be prohibited from appropriating it "to the prejudice of the pursuers' rights in the premises." The story of the row which culminated in the action is easily told. Stewart, as superintendent of the Court House, took it into his head that he had some right to this fee, and got it paid over to him on various occasions. This was really too much for these macers. Possibly, as we have seen probably, they had no earthly right to it themselves; but, ye gods! was it to be endured that a mere superintendent, holding an office described on record by the eminent counsel who represented them, as "a modern one," should attempt to lift moneys heretofore handled by the official descendants of those who for centuries had reaped many a rich harvest of "dewties," and the like. The superintendent defended himself stoutly, and by the aid of his counsel, now a learned sheriff, made out no feeble case. Even his official pedigree was lengthened till it stretched back to meet and merge in the extinct "keepers of the Parliament House," whose very names had ceased to be known since 1816. Thus raged the battle between two parties, whose "rights in the premises" were both hazy to a degree; the one side held their offices on the footing that they were not to receive fees, the other had put forward a claim he was unable to substantiate, and merely was in a position of negative resistance. Here was a pretty kettle of fish! But discretion prevailed, and probably both sides came to see that the result of the action could benefit neither of them. If the superintendent succeeded in driving off his assailants, he would assuredly be pulled up and compelled to account for his fees in Exchequer; whilst on the other hand, if the macers were victorious, they were only drawing public and official attention to an abuse which was certain to be remedied at no distant date. Accordingly the defender gave way, the case was compromised, and the danger of unpleasant revelations as to the fees of a macer was, at least on that occasion, warded off. How far such abuses may or may not have been continued down to the

present day, it is not for us here to consider; it has sufficiently answered the purpose we have in view to give an outline of the case mentioned, as a warning that it by no means follows when fees are demanded that any legal right whatsoever exists to make the demand.

The history of the macerships of the Court of Session may be said to be completed by the case of *Green and Others v. Stewart*, except in so far as the Justiciary macers and their relation to the others is concerned; but a few sentences will dispose of this remaining branch of the subject. The macers of Justiciary in 1815, as we have seen, enjoyed incomes amounting in all to nearly £200; but from various causes it was found that this was inadequate, especially when the increased work at the circuits entailed heavy travelling outlays. Accordingly, in 1843, a revised scale of salaries and allowances was fixed for these officers, assigning to them £300 a year of salary, and £75 for travelling, hotel, and personal expenses. At that time they cited jurors as well as witnesses for the High Court from the three Lothians, and witnesses in Mid-Lothian for Circuit Court trials. These salaries, however, it is recorded, were pronounced by the Treasury in 1868 to be excessive, especially seeing that the citation of jurors was then about to be rendered legal by means of posted letters, and accordingly the direction was given for the reduction of the salary of the Justiciary macers, as vacancies occurred, to £200 per annum, inclusive. The institution of additional circuits in 1881 afforded, however, an opportunity of which the macers were prompt to avail themselves, and an application was duly made for additional allowances. This resulted in their salaries being raised to £225, in full remuneration for all the duties performed by them, and for all expenses whatsoever incurred by them. They were further expressly bound to account for and pay over all fees received by them, whether in connection with appeals or otherwise. This scale exists at the present time, and it is noticeable that the more recent commissions of macers, both in the Justiciary Court and Court of Session, contain a clause which appears to contemplate the ultimate abolition of this distinction, the sole remaining difference amongst the various classes of macers that formerly existed. The clause in the Justiciary Commission provides that the appointment is "subject to the conditions following, that is to say, the said A . . B . . shall give his whole time to the public service, and shall be bound, when required by the Lord President of the Court of Session in Scotland, to perform (without any additional remuneration) the duties of macer to the Lords of Council and Session." The civil macer, on the other hand, is taken bound in similar form to perform the duties in the Justiciary Court without extra remuneration.

The last regulations laid down by authority and affecting the macers bring us down to 20th March 1884, when new rules in

connection with their official duties were enacted. Presumably the last day of the winter session may have been selected, in order to give the macers the benefit of the vacation during which to reflect upon the change from manual to electric ringing of bells, and to practise the new arts declamatory and otherwise, so as to attain the finish and style now exhibited. The rules forbid the indecent bawling of former years, when all the macers would simultaneously invoke by name the several advocates who stood on the various judges' rolls. Now it is decreed that "not more than one macer shall call a motion roll at the same time." The place of calling is regulated as well as the order, and in what is officially declared to be a "rostrum erected for the purpose" the macer is to take his stand. Whether this "rostrum" resembles the classical ones or not, it is not necessary here to consider, but we must place upon record the gravest doubts upon this point. Standing there, the official duties are begun by sounding a gong, and then the officer proceeds to declaim in what is also officially termed "a loud and distinct voice" certain specified information about the judge, the case, and those conducting it. When, however, a Divisional Court meets or adjourns the gong is discarded, and electric bells give warning of the fact. These last changes are for the comfort of all concerned, and have given much satisfaction, even though they may appear to render yet more mechanical the mechanical duties of a macer's post.

This concludes our history of the macerships, ancient offices of which it may truly be said that the fortunes have been varied in no small degree. Rising at one time almost to judicial functions, they have gradually ceased to enjoy any but that dignity which may be native to themselves as individuals, or may yet cling to the robes which envelop them as officials of the Court.

RECENT JUSTICIARY DECISIONS.

THE operation of the Summary Prosecutions Appeals Act has led to an increase in the number of decisions given in the criminal Court upon questions of relevancy, etc. This Act affords at once a speedy and a cheap appeal, and has been the means of determining points of no small importance. Some have been inclined to advocate a similar system of appeal in all petty civil cases. In so far as the Small Debt Court is concerned there is hardly a necessity for any change in the existing procedure, which sufficiently provides a remedy for improper or incompetent acts upon the part of the judge, while the questions of law are similar to those disposed of in superior tribunals. But an appeal upon a case stated might be conveniently taken in proceedings under a number of statutes dealing with civil matters which exclude a rehearing upon the merits. Why, for example, should there not be a right of appeal

under the Agricultural Holdings (Scotland) Act similar to that given by the corresponding statute for England? Glancing over the decisions which have been pronounced in the supreme criminal Court of this country during the past year, we observe that clauses of the Summary Appeals Act have been twice under judicial consideration. In *Hutton v. Garland and Another*, June 13, 1883, the Court was called upon to decide what precisely is meant by the period of three days within which, under the third section, caution is to be lodged by the appellant. A man was fined upon Saturday the 19th of May 1883, and he lodged his caution upon Wednesday the 23rd. The clerk refused to take it upon the ground that the statutory period had expired. The Court sustained his refusal, holding that the Sunday which had intervened fell to be included as one of the three days. "The question," said Lord Young, in giving judgment, "here depends upon the consideration whether when one of the days within which a convicted person is entitled to appeal to this Court is a Sunday, that day is to be counted as a *dies non*. Three days is no doubt a short period, and to deduct one working day may no doubt be a serious matter, but I am afraid the law is quite settled." He admits, however, that an exception must be made when, owing to Sunday being the last day of the three, it has been found impossible to lodge the papers in consequence of the place for lodging them having been found closed.

The case of *Lee v. the Local Authority of Lasswade*, which also relates to the interpretation of this statute, was heard before the whole Court. The question for determination was this. Under section 3 an appeal may be taken in every summary proceeding for the prosecution of an offence or recovery of a penalty competent to be taken before an inferior judge. Now the appellant here had been dealt with under the Public Health (Scotland) Act of 1867. The Sheriff had found him to be the promoter of a nuisance, and had ordained him to carry out certain operations, under certification that if the decree was not complied with, the defender should be liable in the penalties enumerated in the Act. When the case came before the Justiciary Court, it was contended for the Local Authority that the appeal was at least premature, no punishment having been as yet inflicted nor penalty imposed. On the other hand, Lee maintained that the case had been "determined" in the sense of the Act, judgment having been pronounced on the merits. The Court sustained the plea for the respondents, and refused this appeal. The judges were unanimous in the opinion that at the stage which proceedings had reached in the Court below no appeal was competent, and the Lord President said: "I should not like it to be supposed that I countenance the view that a mere failure to comply with the order of the inferior judge would convert this case at a later stage into a proceeding for the recovery of a penalty."

We note several cases raising questions of relevancy. Alternative charges seem to form a trap into which unwary magistrates not unfrequently fall. In *Barr v. M'Phee*, July 18, 1883, a case from the Glasgow Police Court, Lord Young remarked: "It is very surprising to notice the difficulty public prosecutors seem to find in comprehending the very simple idea that the safe way to state a charge is to state it copulatively and not alternatively. I have pointed out that if the general conviction falls, it is the conviction of the whole charge; but according to our law and practice, a party charged with one or more offences may be convicted of any one or any part amounting to an offence. That is, I repeat, our practice, and the common law. But when you have an alternative charge and a general conviction, it is impossible to say on which charge the magistrate convicted, and the cases are infinitely innumerable where the conviction has been set aside on that ground." In this particular case the accused was charged with having assaulted, struck on the face, or otherwise abused certain persons. He was convicted of the offence charged. It was held to be a general conviction following upon an alternative charge. The Lord Justice-Clerk hesitated, although he did not dissent. There is much force in the remark which fell from him, to the effect that the alternative was not in the charge but in the *modus*. But he also thought it was "so easy for the public prosecutor to say in plain terms what he meant," and he expressed the hope that this decision would prove a wholesome example in the future. This case may be compared with that of *Hendry v. Ferguson*, June 13, 1883, where the accused was charged with a breach of the peace, committed by "shouting and screaming at the top of his voice, or otherwise creating a noise and disturbance." He was convicted of the offence libelled, and the Court held rightly convicted. It is difficult to see any distinction between the two cases. In the first the offence was assault, and the manner of assault was by striking on the face, or otherwise abusing. This was held to be an alternative charge. The Court quashed the conviction, because neither the complaint nor sentence explained the words "otherwise abuse." In the second case, the offence was breach of the peace, and the manner set forth was "shouting or screaming," which answers to the striking on the face, followed by the vague alternative of "otherwise creating a noise and disturbance," quite as vague as the "otherwise abuse" of the former case. And yet the Lord Justice-Clerk in disposing of the appeal said: "Police Court complaints are not to be judged of with too great strictness. This complaint is no doubt drawn with an alternative raising doubt, and ambiguity where none is necessary, but I don't think that there is a fatal ambiguity in it." Lord Young had felt doubts, but concluded that he "must decide the case on its substantial merits." As *Barr v. M'Phee* is later in date it must rule, and the moral to be derived from the whole matter is that prose-

cutors should avoid, when possible, alternative charges. The case of *Stirling v. Murray*, June 13, 1883, raises a somewhat different point, but affords another striking illustration of the care necessary in framing the most trivial criminal complaints. A section of the General Police Act makes it a criminal offence to use in any street insulting words with intent or calculated to provoke a breach of the peace, "to the obstruction, annoyance, or danger of the residents or passengers." A man was accused of using expressions calculated to cause a breach of the peace, but these words which we have quoted above were not inserted in the charge nor conviction. The High Court quashed the sentence. In *Ritchie v. Brown*, Feb. 22, 1884, a person was convicted of an offence under the Public Houses Acts, and sentenced to pay a fine, or, failing immediate payment, go to prison. But the particular section of the Act 9 Geo. IV. c. 58, under which this conviction was obtained, allows fourteen days' grace for payment of the fine to be imposed. The Court held that the sentence contained a blunder which was so incorporated into the rest of it that it was impossible to sustain it to any extent, and that therefore, even as regards the imposition of a fine, it must be held to be invalid.

On the other hand, the Court have recently refused to quash a sentence because of a mere clerical error. Thus, in *Gallie and Others v. Ferguson*, Nov. 21, 1883, the accused was sentenced to pay the fine of "fifteen each of penalty." They paid fifteen shillings, and then suspended the sentence. Lord Young: "We are of opinion that this bill must be refused. The blunder with respect to three or four of the prisoners is that the word 'shillings' was not expressed in the conviction. But in the ordinary course of business we know the fine is announced by the magistrate, and it must have been so here, as fifteen shillings were paid."

A peculiar case of irregular proceedings at a criminal trial is reported from a Sheriff Court. The Sheriff, at the request of the jury, examined a witness not on the list, after both the Crown proof and that for the defence had been closed. Lord Young said that he did not think this case was even arguable—"It has been ruled over and over again, in more or less remote times—for there never has been any question in more recent times—that a prosecutor could not call a witness after his case has been closed, but to call a witness whose name is not on the list, or mend the case in any way after the case for the pursuer is entered on, and his proof also closed, is one of the most extravagant and irregular proceedings I ever heard of in this Court." He seems to have considered it as possibly doubtful whether a prisoner could render such proceedings competent by giving his consent.

It is rarely that a mistake so glaring appears on the face of an indictment as is the case in *Bole and Others v. Stevenson*, Nov. 2, 1883. The suspenders were charged with the crime of perjury. It was set forth in the indictment that they had falsely sworn that

they did not see a certain assault committed upon the 27th of August 1883, whereas the indictment undertook to prove that this assault was actually committed. The objection to such an indictment was so obvious and serious, that the respondents sought rather to oppose the suspension upon the ground that it came too late, not having been taken at the first diet. Lord Young said: "The rule of law that many objections can be cured by verdict after trial by jury—for example, objections to citation and the like—is perfectly well settled; and the same rule holds in the Civil Courts. But this case does not come within the scope of that rule, for here we have really no crime charged." Expenses were, however, refused, because the objection had not been stated at the first diet.

Reaney v. Maddever, Nov. 22, 1883, may be mentioned as another instance of the great care necessary in dealing with alternative charges. A seaman was charged under a section of the Merchant Shipping Act with wilful disobedience to the lawful command of the master "or" the engineer, and was convicted of the disobedience charged. This conviction was suspended. The Court held that the complaint should have distinctly informed the accused who gave him the orders which, it was alleged, he had disobeyed.

There are one or two decisions relating to special crimes. In *H.M. Advocats v. Simpson*, July 16, 1883, the Court decided certain points relating to the new statutory offences which constitute fraudulent bankruptcy. Under the Act 43 and 44 Vict. c. 34, it is a crime if the debtor fail to make a full disclosure of the state of his affairs. The Court have laid down that in libelling this offence the indictment must set forth (1) the true statement with regard to the accused's affairs; (2) the allegation that the accused knew it to be such; and (3) that he did not disclose it. Again, it was held that when a man is accused of failing to deliver up his books and papers, it must be set forth that such did really exist.

In *Gracie v. Stuart*, Feb. 22, 1884, it was held that a prisoner may be tried for the crime of reset by the Sheriff of the county in which he has been found possessed of stolen goods, and that it is not necessary to prove that he got possession within this same jurisdiction. It was also held in this case, that when in a declaration the prisoner has referred to some one afterwards cited on his behalf, but who fails to appear, it is competent for the prosecutor to lead evidence as to this person's character.

A very important case for all so-called "inferior" judges is that of *M'Leod v. Speirs*, March 20, 1884, in which the Supreme Court recognised the right of less important tribunals to punish in the most summary manner improper conduct exhibited before them by any person. The Sheriff-Substitute of Inverness, acting at Portree, and sitting as a civil judge, sentenced a witness to

imprisonment, with hard labour, for prevarication. In the suspension the Sheriff, through counsel, intimated that he declined to appear as a party, it being inconsistent with practice and his official position. This course upon the part of the Sheriff met with the approval of the majority of the Court. Upon the merits they held that there was no difference between a Sheriff and a judge of the Supreme Bench as regarded the right to punish for contempt of Court, and that it was unnecessary for the warrant under which the offender was committed to set forth the particulars which constituted the offence. Lord Young formed the minority. In the first place, he thought that the Sheriff should have appeared and vindicated his conduct, and that a suspension without a respondent could not be entertained. "When an inferior judge or magistrate, without any charge laid before him, at his own hand sentences a subject of the Queen, whether a party to a crime or a witness to a cause, or a stranger present in his Court, to imprisonment for hard labour for conduct which he deems to be a contempt of Court, and the sentence is duly impeached in this Court as illegal, I should have thought it not doubtful that the magistrate is himself the proper respondent to be called on contradiction to defend it: That it is incompatible with the dignity of a Sheriff-Substitute to appear as a respondent in this Court is an idea almost too ridiculous to be expressed." He further held that such a sentence as had been pronounced in a civil Court was illegal and without precedent, the instances quoted from the records of the supreme criminal Court not being in point. Moreover, the Sheriff had failed to specify the particulars of the alleged offence. In the recent case of *Laurie v. Roberts* their Lordships had quashed a sentence for contempt of Court, being of opinion that the circumstances as disclosed in this sentence did not warrant its infliction. "Suppose," said Lord Young, "the sentence there had been in such general terms as the one before us, and had only found that the party had grossly insulted the Court, and so was guilty of contempt, we must, assuming the *ex facie* regularity of the sentence, have done an injustice, and left the party to suffer punishment for what (the facts being unnecessarily disclosed) we accidentally discovered to be no offence at all." In short, even taking the most favourable view of the Sheriff's proceedings, Lord Young held them to have been illegal and unprecedented, but aggravated in this case by the want of specification in the sentence, and the failure to defend it when it was called in question. Lord Young's opinion presents a formidable and most able argument against the views which were adopted by the majority of his brethren. But at the same time it must be said that if he is right, judges, at all events "inferior" judges, might find it difficult at times to vindicate the dignity of the Bench. Lord Adam very properly remarked, that "it might possibly be desirable that the form of proceedings in inferior Courts should be such as to enable

a Court of review in all cases to judge *ex facie* of the proceedings whether a particular conviction was right or wrong." This might be effected by the Legislature. As the law at present stands, however, it is clear that a Sheriff, and possibly even a bailie, can sentence for contempt of Court without specifying the facts which, in his opinion, constitute that offence. In this particular case of *M'Leod*, surely the wisest course would have been for the Sheriff to have remitted the whole matter to the fiscal to be dealt with in the ordinary way.

CONFLICT OF JURISDICTION BETWEEN THE ENGLISH AND SCOTTISH COURTS.

THE following remarks appear in an able article on the *Orr-Ewing* case, by Mr. Alexander Robertson, barrister-at-law, in the current number of the *Law Magazine and Review*. After going at length into the history of the case, the author proceeds:—

The action in the High Court of Justice in England has, in the Chancery Division of the High Court of Appeal, and also in the House of Lords, been decided by, and according to the law and practice of England. In it the grounds of the decision were—(1) that the Court had jurisdiction in trusts, no matter by whom or in what country they were created; (2) that the plaintiff, who resides in England, had certain legal claims against trustees, some of whom resided in England, and the others in Scotland; (3) that the trustees were served with a writ of the said High Court, in accordance with its rules and practice; and (4) that they, as defendants, entered appearance in common form. That the Judges of the said Court of Appeal could, on English law and precedents, give no other decision than they did, is beyond the shadow of a doubt. And if the duty of the House of Lords is to decide appeals according to the law of the country in which the cause for the appeal arose, the order of the House in this case is right, and in strict conformity to English law and English justice. But, on the other hand, it is worthy of consideration whether the House of Lords ought not to harmonize the conflicting rights of jurisdiction of England, Scotland, and Ireland, and give judgment with a due regard to all the rights and interests involved. This is a point *sub judice*, and will be most conveniently discussed in detail, after the House has had this view of the matter fully before it. As a question of English law, however, and upon the facts disclosed in this case, the jurisdiction of the English Court is complete and undeniable, the order for a general administration just and proper, and the decision of the House of Lords final and irreversible. It has been urged that, if the House of Lords has gone wrong in the appeal already decided, the Legislature, or the

English Judges exercising legislative authority, can alone provide a full and adequate remedy against the recurrence of the grievance. Yet, on the other hand, if an opinion expressed by Lord Chancellor Hardwicke is good law, "the Court is at liberty to suspend its decree if a difficulty to perform it is shown" (*Penn v. Baltimore*, 2 W. and T. 782). Nay more, if the former appeal in the House of Lords had to be decided by English law, it is not easy to see why an appeal from Scotland to the House of Lords should not be decided by Scottish law.

I have already stated that the decision in the English Courts is pregnant with serious consequences. Let us suppose, for example, that the English Courts attempted to enforce their views by the imprisonment of one or more of the trustees. In such an event, grave national questions between England and Scotland would immediately arise, and possibly could not be solved without the interposition of the Imperial Legislature. Even now, while these pages are going through the press, a Judge of the Chancery Division of the English High Court of Justice is engaged in hearing arguments urged before him for and against the suppression of the orders of the English Courts, and as to the desirability of allowing the minor plaintiff in the English action to appeal in the name of the trustees to the House of Lords from the decision of the Court of Session. I admit that it is highly desirable that the trustees should proceed with an appeal to the House of Lords. Nor, as the report in this application would seem to indicate, is there any legal or technical difficulty in the way of their so appealing; for, in a final judgment, there is a right of appeal from the Court of Session to the House of Lords as a matter of law. But, even under a full and ample indemnity, I do not know of any authority vested in the Courts of England to compel Scottish trustees so to appeal. The English Courts having asserted a jurisdiction which would have been better relegated to Scotland and the Scottish Courts, in which complete and ample justice could have been obtained, have no right to compel these trustees to appeal from a judgment with which they may be perfectly well satisfied. A great principle is involved in this case, and ought to be strenuously and fearlessly upheld. In the interests of England and Scotland, the sovereign jurisdiction of both countries must be maintained inviolate; and the Supreme Courts of both ought to protect those subject to them to the utmost of their power. Upon these points, the House of Lords is the highest and final Judicial Court of Appeal in this country.

Here it is important to observe that neither the Judges of the English Court of Appeal, nor the noble and learned Lords in the House of Lords, decided the appeal before them on the ground that part of the testator's estate was in England, or that probate, or its equivalent, had been obtained in England, or that the judgments of the English Courts could be enforced in Scotland; or

that the opinion of the Scottish Judges of the Supreme Court could be obtained as to the interpretation of the testator's will in the administration of his estate in England. Each of these points has a very important bearing in the case. But none of them has anything to do with the grounds of the decision in England. Nor, I may add, was the minority of the plaintiff, nor was his being a ward of Court, at all necessary for the support of the jurisdiction of the English Court in this matter.

Minority in England is a sufficient ground for the appointment of a guardian by the High Court of Justice, and entitles the minor to the protection of the Court in the defence of his estate and the protection of his property. But it does not, and it cannot, enlarge the jurisdiction of the English Court beyond its ordinary limits, or increase the powers of the Court beyond the ordinary rules of English law. Here, however, all the requisites in *Stirling Maxwell's* and *Innes'* cases were satisfied, and hence the decision in England (11 Chancery Div. 522; 4 Drew. 457).

Still, even although the High Court of Justice has a right to assert the alleged jurisdiction, it is desirable in the interests of justice and expediency that the English Court should have held, as Mr. Justice Manisty did hold, that the exercise of the right was in the discretion of the Court. For, beyond all doubt, the rule laid down in this case is even more intolerable to the Scottish people than the right of guardianship asserted in the case of *Johnstone v. Beattie*. In that case, which was an order for an English guardian to a minor whose father was a Scotsman, and had nominated guardians to his son, and whose property was in Scotland, the rights and interests of the minor himself were alone immediately involved. In the present, the rights and interests of other persons, who are more deeply interested in the proper and economical administration of the trust estate than the minor plaintiff, are seriously, and, as I think, injuriously affected. If the English Courts ought to, or can, enforce the rights of minors, or plaintiffs, to the extent held in this case, the necessary legal proceedings ought in justice and fairness to be at the expense of the minor plaintiff himself, and not at the expense of the general trust funds.

In the English action, when the Appeal Courts were informed that the trustees were administering the trust according to the law of Scotland, and were shown that the plaintiff's interests were not endangered, but amply protected, the decision which would have satisfied the justice of the case, and the Law of Nations, would have been that their lordships would not interfere, and would relegate the minor and his guardian to the Scottish Courts to enforce any claims they thought they could legally demand.

I am aware that the late Master of the Rolls, on the 21st of March 1881, held that the administration suit before him was for the advantage of the minor. But there is no doubt whatever that the people of Scotland will agree with Lord Blackburn rather

than with Sir George Jessel on this point. Against this order the trustees should have appealed, and done all they could to have it set aside. Instead of that, they did nothing of the kind. Why they did not appeal against it, is not, in the light of their subsequent proceedings, very easy to understand. Perhaps they thought that the expense involved was of no great consequence. But the decision has most vital bearings on the execution of all Scottish wills, and the legal rights of the people of Scotland, as to the administration of justice. Whether the trustees have acted wisely or not on this head, the people of Scotland ought not to allow this case to be cited against them hereafter. Clearly the Judges of the Court of Session do not think that an English administration suit was for the advantage of the trust estate, or of the parties interested in it, and, so far as possible, they will not allow their officer, the judicial factor, to obey the orders of the English Court in any administration suit against him or the trustees. An English administration suit practically supersedes the management and control of trustees, executors, or administrators. From the nature of the trusts created, there can hardly be any doubt that the trustees in this case would be superseded in reality. In such an event the English law and practice would be the rule adopted; and through ignorance or inadvertence, the legal rights of parties under the law of Scotland would often be endangered or forgotten.

In the circumstances which have emerged, the English High Court of Justice ought to suspend the execution of its decree; for the trustees ought not to be subjected to the serious inconvenience of being, or running the risk of being, imprisoned for contempt of Court, in a case in which they have shown no reluctance to obey the orders of the English Court, and in which the Supreme Court of Scotland has deprived them of the power to obey the orders of the Supreme Court of England. At the very least, the English and Scottish jurisdictions ought not to be enforced so as to be mutually destructive of each other. If the minor plaintiff has a cause of action or legal claim against the trustees, or others, let him bring his action to protect his special interests, in England or Scotland, as he may be advised, and let him abide the result in protecting these interests, and at his own peril. For a general administration suit, the English Court was not a *forum conveniens*—because the trust-deed was Scottish, the trust-estate was nearly altogether Scottish, and the major part and quorum of the trustees resided in Scotland, and the whole of the rights of the parties ought to be decided by the law of Scotland. Under such circumstances, private individuals, at all events, ought to be scatheless, and the collision of jurisdiction should be decided without involving injurious consequences to them. Unless the trustees or their quorum are actually resident in England, jurisdiction, on the facts proved in this case, ought not to be exercised in England. Here

the major part and quorum of the trustees resided in Scotland. To bring an administration suit against trustees on the actual facts in this case, is to impose a heavy and onerous burden on gratuitous trustees, who are already sufficiently burdened with responsibility. In the case of a small estate, and poor persons as trustees, the trust and the trustees would alike be ruined by the English procedure. As a general rule, the domicile of the trustees in a case of this sort ought to determine the jurisdiction to which they are subject.

Between the law of England and that of Scotland there is an essential and fundamental difference in the administration of trust estates. By the law of England the cestui-que-trust is entitled, as a matter of course, to have the trust estate placed under the control and management of the Court. But by the law of Scotland, the beneficiary and cestui-que-trust is not entitled to appeal to the Court, or obtain a judicial administration of the trust estate, so long as the trustees duly and properly execute their obligations and perform their duties, or until there is a danger likely to arise to the trust estate by the conduct, actions, or position of the trustees. The English Courts look to the wishes of a single beneficiary as their guide, while the Scottish look to the confidence of the testator in his trustees. I therefore venture to assert that the rationale of the Scottish law is more in harmony with the true principles of justice and equity than that of the law of England; and that, in the case under discussion, the excellency of the one system over the other is clearly demonstrated.

In the present case, the trustees were, according to the law of Scotland, engaged in a regular, proper, and just administration of the estate committed to their care by the testator, their management of the trust was unimpeachable, and the trust estate was in no way endangered by their position or actions. Yet, by the acts of a stranger, who had no interest in the economical administration of the trust, acting in pursuance of his own legitimate interests, and availing himself of the rules of English law, the trustees appointed by the testator were, as far as possible in England, virtually deprived of the trust reposed in them by the author of the trust, and of the rights and privileges expressly conferred on them by him, and conceded to them by the laws of the country in which, at the time of the testator's death, the assets were, for the most part, situated, and in which they had actually undertaken to discharge their duties as trustees, and in which the whole estate, in England as well as in Scotland, could most conveniently be collected, managed, and distributed. In brief, by the English judgment now standing, the rights of a single legatee have been enlarged, and the rights of the trustees and the remaining legatees have been diminished.

No doubt this trust estate could, if necessary or desirable, be properly administered in the English High Court of Justice. The

expense of management and administration would unquestionably be greater in England than in Scotland, but the expense would not absolutely be thrown away. The additional expense, for instance, would be partially compensated by absolute security to the beneficiaries. In an English administration suit, nothing can be done without the sanction of the Court. In an ordinary Scottish trust, everything is done without the necessity for the authority of the Court.

That the trustees should not have at once protested against the assumption of jurisdiction by the English Courts over themselves or their trust, and should not have appealed against the order of the Master of the Rolls of 21st March 1881, are, at first sight, facts not a little strange. But perhaps the decided cases somewhat misled them as to the law, and their confidence in the goodness of their defence misled them on the merits. Be these things as they may, the English Courts have decided against them both on the facts and the law. Nay more, Lord Justice Cotton appears to be somewhat doubtful as to the effectiveness of any objection on the threshold of the English proceedings, against the jurisdiction of the High Court of Justice in England. If his doubt be well founded, and I venture to hope it is not, the only requisite for an English administration suit is the existence of an action in the Supreme Court of England. This is perfectly clear; for the two special requisites held sufficient to found jurisdiction in England were an action against trustees and a submission to the jurisdiction. If the trustees could not object to the jurisdiction, an action in England is alone necessary to establish the English jurisdiction. On the other hand, had the trustees never appeared in the English Court, and had they objected at the very outset, the Supreme Court of Scotland would have protected them, and rendered the order of the English Court null and void as regards the estate; and, if necessary, deprived the trustees, permanently or temporarily, of their trust, and so rendered the orders of the English Courts of no effect, both as to the trust estate and the persons of the trustees. That the Scottish Courts would have so acted cannot, in the knowledge of what they have done, be doubted for a moment. But of course the legality of the proceedings in the Court of Session has not yet been finally determined. Avoiding, for the present, the further discussion of the proceedings in the Court of Session, let us see what are the rights of the Supreme Courts of England and Scotland, and how far those rights will help us to anticipate the final decision in this matter.

1st. Both are supreme within their respective territories, and exercise sovereign jurisdiction therein. Of this proposition no proof is needed. As regards jurisdiction, the Courts of England and Scotland, notwithstanding any observations to the contrary, are in the position of the Courts of foreign countries, and are free and independent of each other.

2nd. Neither can coerce the other. This principle, as regards Scotland, is expressly provided for by the Articles of Union between England and Scotland, and is a fundamental principle of every free and independent nation, and is not affected by the identity of the Sovereign. But, with all deference, I do not admit that the 19th Article of the Treaty of Union has been rightly construed by some of the Judges in the Court of Session. This article, with all submission, I venture to think, refers to the exercise of jurisdiction of the Courts of England over the Courts of Scotland, and not to actions which might be instituted by litigants in the Court of the latter when they might have been commenced in those of the former (*Johnstone v. Beattie*, cited *supra*).

3rd. The Courts of every civilised country in the world recognise the laws of civilised countries, in so far as not inconsistent with the laws of justice and morality and their own municipal laws.

The trustees in this case having certain rights clearly and unmistakeably bestowed on them under and by virtue, and under the sanction, of the laws of Scotland; and the beneficiaries having no higher or better right than the trustees; and the whole of the rights of all the parties being capable of being more conveniently determined in Scotland, and under the control of the Scottish Courts than in England, justice and expediency appear to be favourable to the support of the Scottish jurisdiction in this case. When the domicile of the major part of the trustees was unquestionably in Scotland, the matters in dispute should have been left for the sole decision of the Scottish Courts. Yet these rights and privileges of the trustees under the law of Scotland were simply ignored by the English Courts of Appeal, and even Lord Watson held that he was bound to decide the English Appeal on grounds of English law and practice. Why should Scottish law and practice have been excluded from the purview of his lordship? What is the use of the House of Lords as an Imperial Court of Appeal, unless conflicting laws and jurisdictions under its authority can be harmonized in the interests of justice and equity?

I need hardly notice the distinction of primary and ancillary administration introduced so largely in different aspects of this case. There was really no use for any kind of administration in England unless on behalf of the minor plaintiff, or of those who used him as an instrument for the accomplishment of their own ends; for the testator left no debts in England, and the whole assets in England were substantially collected by the trustees and transferred to Scotland before the administration suit was even begun in England. What rights English creditors had against the testator's assets in England need not be discussed. The sole question in this case is: Has the minor plaintiff a right to compel

the trustees to administer their trust in the High Court of Justice in England? If the object of the minor plaintiff and his legal representative was simply to secure the estate vested in the minor plaintiff, the Supreme Court of Scotland was open to them to obtain their object as far as the testator ever intended they should attain it.

As for the suppositions and conjectures which have been made as to the objects of the Act of 1858, they must be wholly laid aside as unimportant, because the words of the statute are clear and explicit and give them no support. The words of the statute are, that the including of English estate in a Scottish inventory, when the deceased died domiciled in Scotland, shall have the same force and effect as if, after the inventory had been sealed, and not till then, probate had actually been obtained in England. The statute merely dispenses with the necessity of obtaining a formal and legal title twice, instead of once, and leaves the legal rights and obligations of those interested in the estate in the same position as they stood before the Act was passed. This privilege is conferred when the deceased died domiciled in England or Scotland or Ireland, and, for very good reasons in connection with taxation, does not comprehend a foreigner, or even a British colonist. But, on the other hand, the trustees in this case having actually obtained possession of the English assets by virtue of a lawful authority, they ought to be subject to no other than the ordinary Courts of Law in Scotland, so far at least as the minor plaintiff's claim is concerned. This proposition is, I think, a simple and unquestionable application of the Lord Chancellor Cottenham's opinion in *Preston v. Melville* (8 Cl. and Fin. 1).

On the ground of the inconvenience, of the practical, technical, and legal difficulties involved in a limited administration, I scarcely think there can be any doubt that a limited administration for the benefit of the legatees under a trust or an executory, would be contrary to legal principles and common sense. In *Pipon v. Pipon* (1 Ambler 25), Lord Chancellor Hardwicke expressed himself very strongly against a partial administration, and said that it was opposed to the meaning and intent of the English Statute of Distributions, and refused to afford any remedy to a plaintiff asking for administration to the extent of the English estate, of an estate in which the funds were partially situated in England and Jersey.

As for the English action for administration being an invasion of the confirmation of the Commissary of the county of Dumbarton, I cannot help thinking that the suggestion is untenable and absurd. The words of the confirmation are that the trustees are bound to render count and reckoning when legally called upon so to do. How "legally" can be exclusively interpreted as meaning only in the Courts of Scotland, is not very apparent. The words of the confirmation give no such limited signification; and if all the

trustees removed to England, whether they took the whole of the trust estate with them or not, I can hardly doubt that the Scotch, as well as the English Courts, would rightly hold that the beneficiaries had a good claim in the English Courts against the trustees.

There are other points to which reference might advantageously be made, but they are not so important as to require minute or special notice. The decision in the Court of Session can be sufficiently defended on the rights conferred by the testator on his trustees, the normal domicile in Scotland, the sovereignty and independence of the Scottish Courts, the universal recognition of the rights of civilised countries by each other, and the convenience, expediency, and equity of a general administration in Scotland, and not in England.

Taking all these matters into consideration, I submit that the Judges of the Court of Appeal in Chancery, and, at all events, of the House of Lords, ought not to have decided the English action before them according to English law and practice, but according to Scottish law and practice, and thus have rendered the subsequent proceedings in Scotland unnecessary. If I am not right in this contention, the Court of Session ought to have recognised the decisions of the English Courts, and admitted the law and practice of a foreign country to have greater effect than the law and practice of their own. To have recognised the Scottish law in this matter, I have already indicated, was, I think, a duty on the part of the Judges of the English Courts on the grounds of justice and expediency. According to my view, the rule *Res judicata pro veritate habetur* was not binding on the Court of Session. In the Roman Empire, a final decree of a Provincial Court was final, except in the highest Court of Appeal at Rome. But since the disruption of the Roman Empire, the Courts of England and Scotland have been separate and independent of each other, and the Judgments Extension Act does not affect the sovereign and independent nature of the Courts of the three parts composing Great Britain and Ireland.

Moreover, the jurisdiction asserted in England over this trust estate was both unnecessary and contrary to the fundamental rights of the Scottish people as an independent nation. To allow such jurisdiction to be enforced is both dangerous and unjust, and ought not to be tolerated, but ought to be resisted to the utmost. If, however, the rules and principles of the English Courts, and of the Scottish Courts as to the exercise of jurisdiction in England or Scotland, are unjust or inconvenient, they ought, without delay, to be repealed or amended by the Legislature, or some other equally well qualified authority, and the circumstances in which service of an English or Scottish writ, as to an administration suit, or in any other cause of action, can be effected, ought to be clearly defined. Of late the discretion allowed in England in the issuing of such writs has been somewhat largely interpreted.

I conclude this article in the words of Lord Campbell in the case of *Johnstone v. Beattie*: "If there is any practice in the Court of Chancery to sanction such an order, it is full time that the practice should be reformed; for I think it is entirely contrary to principle, to expediency, and to common sense."

INTERNATIONAL LAW AS TO THE LEGITIMACY OF CHILDREN.

QUESTIONS which arise in connection with the law as to the legitimacy of children can generally be dealt with by English Judges according to principles which are well established and clearly settled. When they involve questions of foreign law, such law must be proved by the evidence of experts, that is, either by persons who have filled an official position in the country, or by lawyers who have practically studied the law of that country, for there is no rule in England analogous to the 38th section of the Indian Evidence Act, which recognises the relevancy, "when the Court has to form an opinion as to the law of *any* country," of "any statement of such law contained in any book purporting to be printed or published under the authority of the government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings." These questions of legitimacy are, however, frequently complicated by other questions as to domicile and as to the operation of the principles of international law. Of this nature was the action of *Andros v. Andros* (52 L. J. Ch. 793), which was heard by Kay, J., during the last Trinity Sittings. The law which had to be applied there was the law of the island of Guernsey, but it will be remembered that the law of all parts of Her Majesty's dominions other than England (whether it be Scotch, Indian, or Colonial) is treated in the English Courts as standing on the same footing as the law of any foreign country. The questions which were involved in *Andros v. Andros* are not without interest to lawyers in India, where divers and conflicting systems of law have to be recognised and administered by the same tribunals.

Andros v. Andros was a suit for the administration of the estate of William Andros, who died in January 1882, having duly executed a will in August 1879, and the facts were brought before the Court in the form of a special case. The material provisions of the will may be thus stated. There was an appointment of executors and of trustees, and the testator gave his personal estate to the latter upon trust, as to one-third of such estate, "to pay and divide the same equally between such of my grand-nephews, the sons of my nephew Thomas Godfrey Andros, as shall survive him, and shall attain the age of twenty-five years, in equal shares."

The will reserved to the trustees an absolute discretion to pay to his said grand-nephews, or to either of them, the whole or any portion of the capital of the shares or share to which they or he might be presumptively entitled, at any time when his trustees might consider it expedient so to do. It appeared that the testator's nephew was a native of, and was domiciled in, the island of Guernsey, and was married there to a woman who had the same domicile. The plaintiff in the present proceeding was the son of Thomas Godfrey Andros and his wife, but was born before the date of their marriage. Four other children were born after that date. By the law of Guernsey (which corresponds in that respect to the law of Scotland) a child born out of wedlock is legitimated by the subsequent marriage of his parents, and is rendered capable of succeeding to personal property. It was admitted that, in construing the will, the "sons" of Thomas Godfrey Andros must be taken to include only his legitimate sons; but the special case raised the question whether the law of Guernsey ought to be applied to the distribution of the fund, so as to enable the plaintiff to share in it as a legitimate son according to the law of the place of his father's domicile. The defendants in the special case were the trustees appointed under the will and those children of Thomas Godfrey Andros who were born after the date of the marriage.

The argument of the plaintiff's counsel was this, that a child who is legitimate according to the law of the place of his father's domicile, must be treated in England as being legitimate for all purposes of succession to personal property, and in support of this contention they relied upon the authority of *Re Goodman's Trusts* (L. R. 17 Ch. D. 266), which we shall consider more fully. It would follow from this that the plaintiff, being legitimate according to the law of Guernsey, would be entitled under the will to share in the fund with his younger brothers and sisters. The authority mainly relied upon by the counsel for the defendants was the judgment of Lord Hatherley in *Boyes v. Bedale* (1 H. and M. 798).

There is no dearth of authorities bearing upon the question in dispute. The case of *Birtwhistle v. Vardill* (7 C. and F. 895), which came before the House of Lords nearly fifty years ago, is important as having first recognised a distinction between real and personal property in respect of the necessity of proving the legitimacy of a person claiming a right of succession to property in England; that is to say, a person who claims to succeed as heir to real property must prove his legitimacy in the same manner as if his father had been domiciled in England at the time of his birth; but this rule is exceptional, and does not apply to succession to personal property. We will next notice the somewhat recent case of *Atkinson v. Anderson* (30 W. R. 562), which was, however, distinguishable from *Andros v. Andros* both as referring to a devise of real estate and as a case where the devisees had been designated

by name. The question arose under the Succession Duty Acts, whether duty was payable at the lower rate as by legitimate children, or at the higher rate as by illegitimate children, by whom duty is payable on the same scale as by strangers in blood. The testator was an English-born subject, but was domiciled in Italy. His will did not affect personal property, but contained a devise of all his real property, both in England and in Italy, to his four illegitimate children, all of whom were described by their names. He had during his life duly recognised the four children as being his, the effect of which proceeding, according to the law of Italy, was this, that they could succeed to his personal property in that country as *haeredes ab intestato*. Hall, V.C., held that the testator's children must pay succession duty at the higher rate, since their recognition by their father could not constitute them his "lineal issue within the meaning of the Succession Duty Acts." *Boyes v. Bedale*, which came before Lord Hatherley when he was a Vice-Chancellor, is a case which had been very frequently referred to, as deciding that the child of a foreigner, who is legitimate according to the law of the place of his father's domicile, but who would have been illegitimate if his father had been an Englishman, cannot take under a gift of personalty contained in a will to the "children" of his father. Lord Hatherley laid down that the gift and every term contained in it must be construed in accordance with the rules of English law. This decision was recognised and approved by Kindersley, V.C., in a later case, *Re Wilson's Trusts* (L. R. 1 Eq. 247). A domiciled Englishman married an Englishwoman. He afterwards went to Scotland, where, although he had not become domiciled in that country, he obtained a divorce, for grounds which would not have entitled him to the same relief in England. The woman was then married in Scotland to a domiciled Scotchman, and the question arose, whether the issue of the later marriage must be considered legitimate in England. The Vice-Chancellor held that they were not legitimate, and his decision was affirmed in the House of Lords, *Shaw v. Gould* (L. R. 3 E. and I. 55), on the ground that the English Courts were not obliged by the rules of international law to recognise the decree of divorce which had been pronounced in Scotland. The case of *Goodman v. Goodman* (3 Giffard, 643) was something like that of *Andros v. Andros*. There had been a gift in a will to the "children" of a man who was domiciled in Holland, and who had had several children by his wife, born before the marriage, the birth-place of some of them having been in England, he having formerly had a domicile in that country, and that of others in Holland. Stuart, V.C., held that *ante nati* born in England while the father was domiciled there could not take under the gift, but that the *ante nati* born in Holland while the father had a domicile in the latter country, where he was subsequently married to their mother, could take thereunder.

Re Goodman's Trusts came before the Court of Appeal about three years ago, on appeal from a decision of the late Sir George Jessel. The decision appealed against was upheld by Lush, L.J., but was reversed by the two other members of the Court, who held that a child who is legitimate according to the country of his father's domicile is legitimate for the purpose of succession to personalty in England. The decision in *Boyes v. Bedale* was discussed. Cotton, L.J., observed that Lord Hatherley had said in that case that "the will, being that of a domiciled Englishman, must be construed according to English law, which, in my opinion, is correct so far as to require that this word 'children shall be construed legitimate children;' but he held that English law recognised as legitimate only those children born in wedlock. . . . This, though correct as regards the children of persons domiciled in England at the time of their birth, is, in my opinion, erroneous as to children born of parents who at the time of the birth were domiciled in a country by the law of which the children were legitimate." James, L.J., also said—"The decision in *Boyes v. Bedale* was on the ground that in an Englishman's will the 'children' of a nephew must mean children who would be lawful children if they were English children. That seems to me a violent presumption. It was an accident in that case that the testator was an Englishman; but supposing it had been the will of a Frenchman dying domiciled in England, and made in favour of his French relations and their children, or of his own children, there being children legitimate and legitimated, what would have been said of such a presumption and such a construction?" We may add, as was pointed out by Kay, J., that there is a long series of decisions on a point in exact analogy with that which he had to determine, namely, to the effect that a child who is legitimate by the law of the country of his father's domicile can take as next of kin in succession to personal estate in England.

Kay, J., pointed out in his judgment that although *Re Goodman's Trusts* was a decision of the Court of Appeal, Lush, L.J., had concurred with the Master of the Rolls in following Lord Hatherley's judgment in *Boyes v. Bedale*. In the face of such a conflict of opinion, he felt himself entitled to decide the question before him in accordance with his own opinion, which was favourable to the plaintiff's right to share in the gift as one of the children of Thomas Godfrey Andros. He, however, carefully considered most of the earlier authorities. He first pointed out that the will, being an English will, must necessarily be construed by the Court in accordance with the principles of the English law, and that it was a well-established rule that under a gift to the "sons" of a designated father only legitimate sons can take, it being now "settled that any person legitimate according to the law of the domicile of his father at his birth is legitimate everywhere within the range of international law for the purpose of succeeding to personal

property." *Birtwhistle v. Vardill* was an authority for the distinction between real and personal property in relation to this matter; and if the son of a foreigner, who was legitimate by the law of his father's place of domicile, but who would have been illegitimate if his father had been an Englishman, could succeed as a next of kin to personal estate in England, it was very difficult to see why he could not similarly take a bequest of personalty by an English testator under the description of "son" of his father. No doubt Lord Hatherley had held, in *Boyes v. Bedale*, that every word in the will must be construed in accordance with English law, and that therefore the phrase "children" must be interpreted in the way in which the law understands the term. Lord Hatherley's remark, by way of illustration, that a gift of £100 under a Canadian will must be calculated according to the Canadian currency, and not as £100 sterling, appeared to afford a very imperfect analogy, since the circumstance of two countries having the same name for different monetary currencies would not lead to the conclusion that a testator contemplated the calculation of a legacy according to a monetary system not in force in his own country, whereas no such absurdity would arise in recognising the legitimacy of children according to the law of their domicile. The most that could be said was that sons must mean "legitimate sons," but how was the legitimacy to be determined? That was a question of *status*, and the comity of nations appeared to be a guide to the Court in arriving at a decision. Lord Hatherley's *dictum*, that such a bequest could apply only to such sons as would be legitimate in England if their father was domiciled in that country, might be tested in this way. Supposing that by the law of Guernsey the rule of construction upheld in *Boyes v. Bedale* were to prevail, and that a similar bequest to the sons of an Englishman were to be made by a Guernsey testator, then the question of legitimacy would have to be determined by the law of Guernsey, and *ante nati* would be entitled to share in the gift,—a result which would entirely contravene the principle of construction contended for. *Re Wilson's Trusts* was completely distinguishable, but *Goodman v. Goodman* was in point as an authority for the plaintiff's contention, so far as it recognised the legitimacy of the children who were born out of wedlock in Holland but were legitimized by the subsequent marriage of their parents while the father was domiciled in that country. *Re Goodman's Trusts* was an authority to the same effect. Kay, J., also drew attention to the fact that the testator had spoken of his own "grand-nephews," as well as of the "sons" of his nephew, but he held that the question of *status* must be determined in accordance with the comity of nations, which would recognise the plaintiff as being the lawful nephew of the testator as well as the legitimate son of Thomas Godfrey Andros. He accordingly summarized the law in this manner. While a bequest of personalty under an English will to the children of a foreigner

can extend only to legitimate children, the question of their legitimacy must, in accordance with the recognised principles of international law, be determined according to the law of the parent's domicile. According to this principle, children of a foreigner who are duly legitimized by the marriage of their parents after their birth, must be recognised as legitimate by an English Court construing an English will. The result of the conclusion arrived at by Kay, J., appears to have been at any rate in accordance with the wishes and intention of the testator.—*Indian Jurist*.

Reviews.

The Law and Practice of the Courts of the United Kingdom relating to Foreign Judgments, and Parties out of the Jurisdiction; to which are added Chapters on the Laws of the British Colonies, European and Asiatic Nations, and the States and Republics of America. By FRANCIS TAYLOR PIGGOTT, M.A., LL.M., of the Middle Temple, Barrister at Law. Second edition, revised and enlarged. London: William Clowes & Sons (Limited). 1884.

THE subject dealt with in this treatise forms a chapter of private international law which may be described as of the last importance both in the literal and figurative sense of the term. For the treatment of a foreign judgment by the Court in which it is pleaded, either by way of exception or as a ground of action, necessarily involves the principles which that law professes to expound; while the rarity of the questions which may thus be raised affords, of necessity, scope for an exhaustive treatment of the subject. The magnitude of the subject is perhaps the chief objection to the point of view from which Mr. Piggott deals with it; but it cannot be said that it has as yet got beyond his control. The present work contains the substance of both the volumes in which the first edition appeared; but, as the author explains, in recasting and rewriting the volume published in 1879, he has attempted a deeper analysis of the subject. And while the substance of the volume of 1881 re-appears in the chapters xii.—xvi., a considerable amount of information has been added and many serious omissions have been supplied.

Nevertheless the last five chapters, which deal with the regulations as to foreign judgments in force in Colonial, European, and Asiatic tribunals, remain a small and entirely separable part of the work, the real value of which must be as a guide to the English lawyer in the procedure of his own Courts. Its interest to Scottish lawyers is therefore not immediately a practical one, and we cannot pretend to judge accurately of the extent to which Mr.

law, and which will no doubt, as he hopes, prove a step towards obtaining a complete embodiment of the law, and to the knowledge and assimilation of the practice of different nations.

A Handbook of the Sheriff and Justice of Peace Small Debt Courts.
By J. M. LEES, Advocate. W. Blackwood & Sons. 1884.

SUCH is the exiguity of the law book market in Scotland, that a legal work too seldom happens to be written by the person who is pre-eminently qualified to write it. Eminent qualifications involve a busy day's labour and demand a quiet evening's rest, and a complete holiday each year. It is therefore a considerable boon to the profession and to the public when a *Small Debt Manual* is compiled by the judge, who has had, with one or two possible exceptions, the largest experience of the class of practice he describes, and who is acknowledged to have shown special aptitude for the work. Any book on the subject would be welcome and useful, since the Sheriff Small Debt Court has remained unsung since M'Laurin and Barclay issued their little treatise in 1842, and the Justice of Peace Small Debt Court has hitherto been neglected by the literary world. But this manual has evidently been a labour of love, which means care, accuracy, complete knowledge and unreserved communication of it. It may be that the persons who in 1882 brought (or defended) 54,874 actions before the Sheriff, and 16,731 actions before the Justices in these Courts, may have too much confidence in the tribunals to attempt to supply them with law or to check them in interpreting law or fact; but to those who practise either on or below the Bench, or who on circuit may be called on to debate or decide, at a moment's notice, a *Small Debt Appeal*, the handbook will be of the greatest benefit.

It begins with an introduction which, after tracing the origin and development of the two Courts, points out the differences between them. Thus the Sheriff Court limit has in practice received a more liberal construction than the limit imposed on Justice of Peace processes, the reason being that the Sheriff acts at common law as well as by statute, the Justice by statute alone. The cost of a sale after poinding is about twice as great in the Justice of Peace as in the Sheriff Court, and the latter alone can arrest on the dependence or entertain a multiplepoinding or a sequestration for rent, or a forthcoming, or a counter-claim, or, strictly speaking, listen to a procurator. There are certain other discrepancies relating to mandatories, sists, and fees. On the whole, the balance of convenience, so far as it can be secured by legislation, seems to be distinctly in favour of the Sheriff Small Debt Court; and we may well concur with the author in thinking that the large and growing amount of business in the Justice of

Peace Court speaks well for its acceptability among the poorer classes of the community. The rest of the introduction gives a popular description of the procedure in Small Debt cases. The bulk of the handbook is, however, taken up with an annotated edition of the Sheriff Small Debt Act of 1837; the Justice of Peace Acts of 1825 and 1849; part of the Employers and Workmen Act of 1875; and the sections of the Sheriff Courts Act of 1837 relating to Summary Removing. Scattered over the book, in their proper places, may be found about 130 forms of writs in almost bewildering variety; and the index seems to be full and careful.

As will be anticipated, the chief value of the treatise lies in the remarks on the Sheriff Small Debt Act, which take the form of notes appended to each section of the Act, and in the bearing which these remarks have on the cognate work of the Justices. On almost every page will be found evidences not only of intimate acquaintance with the literature of the subject, but also of close familiarity with the practice of the Courts. There could be no better example of the latter qualification than is to be found in the remarks relating to payment by instalments, as an indulgence to certain debtors (p. 60), the employment of agents (p. 54), the procedure following on a sist (p. 57), suing as per pass-book (p. 32), and the restriction of claim so as to bring it within the Statute (p. 29). In general, the author endeavours to confine himself to matters of pure procedure and competency; and here the most important remarks are to be found in the pages which relate to the classes of competent actions (p. 25), sists (p. 57), and, above all, appeals (p. 72 *et seqq.*). But now and again he is tempted to start aside for an incursion into substantive law, and no one will have the heart to cavil, who has read what is said on sequestration for rent (p. 38) and counter-claims (p. 47).

It may smack of fault-finding to point out that the Sheriff Small Debt Act, section 13, implies (what was at its date the fact) that a party to an action could not be put on oath as a witness *in causa*, and that no notice is here taken of the subsequent change in the law; that the considered judgment, *Sinclair v. Holliss*, 1881, 9 Ret. (Just.) 1, not here noticed, cannot be law if the statement (p. 77 d) is correct, that appeals cannot be taken to the intercalary Circuits recently sanctioned; and that a person who sists is not commonly called a "sister."

The History of Burke and Hare, and of the Resurrectionist Times.
By GEORGE MACGREGOR, F.S.A. Scot. Glasgow: Thomas D. Morison. 1884.

THE story of the murderers whose crimes created so much excitement in Edinburgh some fifty-five years ago, has been

frequently told, never however at greater length and with so much minuteness as has now been done by Mr. Macgregor. Another book on the subject will probably never be written—the generation which remembers the murders is rapidly passing away, and their descendants will probably forget the memory of two of the most bloodthirsty, but withal vulgar and stupid, wretches that ever walked the face of the earth. Mr. Macgregor having set himself to perform the task of giving a full, true, and particular account of all the circumstances which led up to, and were connected with, the Burke and Hare murders, it is only fair to say that he has produced a book which is eminently readable. He has not only treated of the murders themselves, but has traced the history of the resurrectionist movement, out of which they sprang, down to the passing of the Anatomy Act, which put an end for ever to the outrages which had until then been practised in the name of science. As regards the crimes which form the more immediate subject of this work, the author has adopted a plan which is worthy of commendation. Instead of giving an account of the trial at length, he narrates the circumstances under which each of the unhappy victims lost their lives, and summarizes the evidence and speeches at the trial itself in the shortest possible way. This is as it should be in a work of this kind; it makes it much more readable, though it must have cost the author no inconsiderable amount of trouble. There is an immense amount of interesting information in the book, and we have no doubt it will be widely read by all who wish to be informed in what was a very curious chapter in the annals of crime. The volume contains several portraits, and is nicely printed.

The Month.

Wit's Jump.—Our clever young contemporary *Pump Court* is responsible for the following story:—"Brougham once, in giving his opinion of the value of a suspicious half-sovereign submitted to him by a friend, exclaimed, 'Tut, it's not worth a copper! Fling it to the devil!' To which vigorous sentiment his friend replied, 'Well, Harry, you always could make a half-sovereign go further than any other man.' In this respect, however, Brougham would probably have discovered a formidable rival in the more modern financier, Mr. Childers."

Our Transatlantic friend the *American Law Review* (whose complimentary notice of us, by the bye, we are glad to acknowledge), gives a somewhat similar anecdote in its current number:—"Lord Coleridge is delighting his English friends with stories of his American visit, and among them was this: He was at Mount

Vernon with Mr. Evarts, and talking about Washington, said: 'I have heard that he was a very strong man physically, and that, standing on the lawn here, he could throw a dollar right across the river to the other bank.' Mr. Evarts paused a moment to measure the breadth of the river with his eye. It seemed rather a 'tall' story, but it was not for him to belittle the Father of the Country in the eyes of a foreigner. 'Don't you believe it?' asked Lord Coleridge. 'Yes,' Mr. Evarts replied, 'I think it's very likely to be true. You know a dollar would go farther in those days than it does now.'"

Of jokes it may be specially said that there is nothing new under the sun. We remember long ago being gently amused by a well-known "wheeze" between the two "corner men" at a certain Christy Minstrels entertainment. The joke, however, was a venerable one, as we shortly afterwards stumbled across it in Bacon's *Apothegms*.

POETS who have manuscripts sent to them for criticism by admiring young strangers, theatrical managers who are continually receiving plays they have never asked for, and fathers of families who are unexpectedly supplied with "sample" champagne by advertising wine merchants, may be glad to learn that it has now been definitely ruled by a Judge of the High Court, Williams, J., in *Howard v. Harris*, 1 Cab. and Ell. 253, that "there is no duty cast upon the recipient with respect to goods sent to him voluntarily by another, and unsolicited by the recipient." The point, which is a very curious one, and has not received from lawyers or legal writers the attention which it merits, was raised but not decided by Lord Bramwell, when Baron Bramwell, in *Hiort v. Bott*, L. R. 9 Ex. 86, in connection with the hypothetical case of a parcel being left at a house by mistake. "What are you to do with it?" asked he. "Warehouse it? No. Are you to turn it out into the street? That would be an unreasonable thing to do." Editors of newspapers and magazines have long ago acted on this view, but probably few were aware that they had law as well as custom on their side.—*Pump Court*.

THE CASE of *Muir v. The Anglo-American Brush Electric Light Company* has given rise to no little variety of opinion both among judges and juries. It appeared that the defendant company had ordered from the plaintiffs a new and peculiar machine in connection with their electric works, which they required in eight or nine weeks. The plaintiffs at first stipulated for thirteen or fourteen weeks, but finally agreed to do their best to complete it as nearly as they could within the required time. In point of fact the machine was not ready for delivery until the expiration of nine months instead of nine weeks. The company refused to accept it, and the plaintiffs accordingly brought this action for

the price. The case has already been the subject of three verdicts. The first jury found for the plaintiffs, the second disagreed, and the judge took upon himself to decide for the defendant company, and the third jury again found for the plaintiffs. Under these circumstances the question for the Divisional Court was whether they were bound to grant yet another new trial. *Prima facie*, it was somewhat strange, as one of the judges observed, that a manufacturer who only asked three months to make a machine should take three times as long over it; but it was obviously a question which could only be decided upon a minute examination of the evidence, and, upon the whole, the Court did not see any sufficient reason for disturbing the verdict. It may well have been that the verdict of the jury turned quite as much upon the apathy of the company, to which their attention had been directed, as upon the diligence of the plaintiffs. Doing one's best is a somewhat vague term, and it may perhaps occur to some people that the plaintiffs' "best" was, at any rate, not a very good "best," though, for our own part, we should be sorry to express any definite opinion on the subject. The case derives its main interest from the amount of perplexity which it has caused all concerned in it, but it contains an incidental point which is worth mentioning. The counsel for the defendants offered an affidavit, which of course the Court did not accept, that two of the jury had given their verdict upon a particular ground. This new fashion appears to be rapidly coming into vogue. More than once recently, as our readers may remember, some jurymen has thought it necessary to write to the *Times* in order to explain the reasons for his verdict. We will not say that it is no part of the duty of a jurymen to have reasons, but it is certainly no part of his duty to publish them to the world, and if once this practice becomes established, the jury system cannot long survive.—*Law Times*.

Amalgamation of the Legal Profession.—This subject is undergoing much discussion in England and Ireland, and it seems lately to have been taken up in Australia, where the two professions are distinct as in England, and not amalgamated as in Canada. The Australian *Law Times* of a recent date contains the following:—

"We understand that there is some prospect of the question of amalgamation of the professions being again raised during the next session of Parliament, and that it is likely to receive considerable encouragement from many solicitors and barristers. As regards the bar, they would to a large extent lose the benefit of a number of public employments, some of them of great dignity and value, for which they are exclusively eligible. In obtaining business from the public, barristers would, we believe, have no chance against attorneys, who have all the clients already secured. Perhaps a few men of high standing and well known to the public would

maintain their position, but we do not believe they could improve it, at least to any great extent. Amalgamation would in other ways be injurious to solicitors. Their profession is crowded enough already, and would not be improved by an evasion from the bar. They would be suddenly called upon to perform work to which they were unaccustomed, and the advantage would be lost both to them and to their clients of that division of labour which has been found so beneficial in all other pursuits and employments. In whatever way it may be looked at, whether from the point of view of the public, the bar, or the solicitors, amalgamation has, in our judgment, nothing to recommend it."

We believe that the English system, of a division of labour between those who confer with clients, prepare causes, and attend to business details, and those who represent the parties in the Court, is a good one, founded on natural convenience, and that it will be a mistake on the part of the two professions in England if they abolish this distinction. If the legal profession in the large cities in America were thus divided, it would be a great gain to its members, and a greater gain to the administration of justice. There is such a thing as progress backwards, if such an expression might be used, which is analogous to that process in nature which Liebig designated by the Greek word *cremaccusis*, and which he described as a breaking down and changing of the molecular organization, without any change in the relative constituents of a given substance. Thus starch, sugar, alcohol, and vinegar are in reality the same substance, in different stages of decay. Whenever the English bar breaks up its present molecular organization and *runs down*, as the chemists say, it will not take a step in advance, but will take a step in decay, such as starch takes when it becomes sugar, or sugar when it becomes alcohol, or alcohol when it becomes vinegar. It is a down-hill, go-to-pieces process, like the retreat of an army,—every man for himself and the devil take the hindmost. The lawyer becomes, much more than now, a man-of-all-work—a jack-of-all-trades; and consequently nothing is well done.—*American Law Review*.

The Faculty of Advocates and the Guardianship and Custody of Infants Bill.—The report by a Committee of the Faculty upon this Bill, which was published in our last month's number, was disapproved of by a majority of the Faculty, and a new Committee was appointed to embody in a report the views of the majority of the Faculty. This Committee prepared the following report, and it was unanimously approved of by the Faculty:—

"This Bill, as its title indicates, deals with 'infants' and their guardians. As infants are a class of persons unknown to the law of Scotland, the Bill provides (somewhat ambiguously) that in its application to Scotland the word infant shall *include* pupils, and the word guardian shall *include* tutors. By another section, all guardians under the Bill (including, we presume, tutors) are

invested with the powers conferred by the Act 12 Charles II. c. 24. From these examples it will be seen that the form of the Bill requires some amendment before it can be made applicable to Scotland.

"The substantive provisions of the Bill are, however, in the opinion of the Committee, open to objections of a graver character. These are embodied in four sections, numbered 2, 3, 4, and 5. Section 2 enacts that 'the parents of any infant shall, during the continuance of their marriage, be its joint guardians.' It appears to the Committee that this proposal need only be stated in order to be rejected, and that any comment by them would be superfluous.

"Section 3 enacts that 'on the death of either of the parents of an infant, the survivor shall be its guardian;' but this is afterwards qualified by a provision in section 4, that the father's nominee shall be joint guardian, along with the mother, of any property to which the infant may succeed on the father's death. The remainder of section 4 provides for the appointment of guardians to act after the death of both parents. The right of appointment is conferred upon the parents jointly; failing which, the survivor of them may appoint. In default of an appointment by the surviving parent, an appointment by the predeceasing parent is to receive effect.

"The Committee entirely disapprove of these proposed changes in the law of guardianship, so far, at least, as regards Scotland, with which alone they are concerned. A widowed mother is not always, or even generally, best qualified to administer the property of her children, or to direct their education, or to select a suitable guardian to act after her death. Under the present law, on the father's death, the guardianship belongs to his nominee, or to the nearest agnate, or to an officer of Court, without prejudice to the mother's right of custody where the children are young. This system has worked well in the past, and, so far as the Committee are aware, no alteration of the law is called for.

"Section 5 provides that 'where any question shall arise as to the custody of an infant whose parents are living separate from one another, or as to the religion in which it is to be brought up, the Court shall have power to make such order as it may think fit regarding the custody of such infant, or the religion in which it is to be brought up.' This section requires more consideration, as it relates to a branch of the law which, in the opinion of the Committee, requires amendment. Under the present system a father may be deprived of the custody of his children if his conduct is such as to endanger their health or morals; but very insufficient protection is accorded to the natural rights of the mother in cases where the husband, though not unkind to the children, has broken up the common home by some serious act of conjugal misconduct. If a wife has obtained a decree of divorce or of judicial sepa-

ration, or has been deserted by her husband, it may fairly be held that he has forfeited the absolute right to determine as to the custody of his children, which would otherwise have been his prerogative as the head of the family. The Committee are of opinion that in such cases the Court should be perfectly free to make such provision with respect to the custody, maintenance, and education of the pupil children of the marriage as they in their discretion may think best, having regard to the interests of the children and to the natural rights of both spouses.

“Section 5 of the Bill, however, goes beyond the lines above indicated, and appears to contemplate that a father may be deprived of the custody in cases where he has not been guilty of cruelty to the wife, adultery, or desertion, and has not disqualified himself by unkindness to the children. If this section becomes law, it will be open to a wife to withdraw herself from her husband's society, and then to petition for the custody of the children, even though she does not allege that he has been guilty of any fundamental violation of matrimonial duty, or that his conduct is such as to endanger the health or morals of the children. If she has deserted her husband merely from caprice, her application for the custody will probably be unsuccessful. Still the innocent husband will have had his most private domestic concerns discussed in a public Court, and reported in the newspapers. But it may be assumed that in most cases there will be faults on both sides. How, then, is the Court to judge whether the husband or the wife is more in fault, and which of the two is the more suitable, or the less unsuitable, custodian? In order to come to a decision, the Court must make itself acquainted with the whole circumstances of the case, the character and temper of the spouses, the history of their wedded life, and the advantages which they can respectively offer to their children. For this purpose an inquiry will be necessary, in the course of which each spouse will lead proof as to the shortcomings of the other. It appears to the Committee that to allow litigation of this character would tend to weaken the bonds of family life, and that the disagreements of husband and wife are a subject upon which a Court cannot and should not adjudicate.

“As the state of public business will probably render it impossible to introduce a separate Bill for Scotland, the Committee are of opinion that the clauses of the present Bill should be limited to England and Ireland, and that clauses applicable to Scotland should be added. Accordingly, they recommend that the preamble should run, ‘Whereas it is expedient to amend the Law relating to the Guardianship and Custody of Infants in England and Ireland, and the Custody of Pupils in Scotland;’ that section 7 of the Bill should be omitted; and that in section 8 the words (line 17 of page 2) ‘In Scotland the Court of Session’ should be deleted.

"The Committee recommend that the additional clauses should run as follows:—

"1. In the cases hereinafter mentioned, viz.:

"(1) Where the wife has obtained a decree of divorce, or of separation *a mensa et thoro*;

"(2) When an action of divorce or of separation *a mensa et thoro* is in dependence at the instance of the wife, and she has, to the satisfaction of the Court, established a *prima facie* case;

"(3) Where the husband has maliciously and obstinately deserted the wife, though such desertion may not have endured for four years;

"the husband and father, as such, shall have no rights superior to those of the wife and mother in regard to the custody of the pupil children of the marriage, but the Court shall have power to make such provisions with respect to the custody, maintenance, and education during pupillarity of such pupil children, as they shall think best for the interest of the children and most equitable to the spouses: And in the event of the Court awarding the custody of such pupil children, or any of them, to the mother, the Court may ordain the father to pay such reasonable sum as they shall, in the whole circumstances of the case, from time to time fix, for or towards the maintenance, clothing, and education of such pupil child or children while in the mother's custody; and the mother shall be entitled to sue therefor in her own name.

"2. Any orders or decrees made by the Court in pursuance of this Act may be altered or modified upon the occurrence of new circumstances, and that in any process which has been already brought, without the necessity of raising any new process.

"3. The word 'Court' shall mean a division of the Court of Session or the Lord Ordinary before whom an action of divorce or separation may be pending; and in vacation the Lord Ordinary on the Bills shall have the whole power of the Court, all judgments of the Lord Ordinary and the Lord Ordinary on Bills being subject to review.

"If these clauses or any of them are added to the Bill, it will be necessary to add a clause stating that they shall apply only to Scotland.

WILLIAM CAMPBELL, *Convener*."

Law in Belgium.—A correspondent writes as follows to the *Law Journal*:—The new Palace of Justice at Brussels is a magnificent structure. It covers an immense space of ground, is placed on a lofty eminence commanding views of the city and of the country for many miles round, and it cost a monstrous, an incredible, sum of money. The Royal Courts of Justice in the Strand were built at an expense that is amazing; but the Palace of Justice at Brussels

can boast a bigger bill. The pure white stone with which the latter is built would of course turn black in a month in London, and the florid Italian style which is in harmony with the palaces and houses of Brussels, would look strange and outlandish in the midst of London architecture. All the old houses near the new Palace are to be pulled down at once, and wide boulevards constructed on their site, so that, by the time the scheme is completed, the Belgian tax and rate payer will have a tremendous reckoning. Let us hope that he will not be guilty of the iniquity of putting the burden on the suitors, after the English manner.

There are nineteen courts in the new Palace; civil and criminal business is done in them. The courts are "got up" wholly regardless of expense. Marble, gold, upholstery of the most luxurious character are everywhere. In the Criminal Court there is an admirable arrangement in the shape of a spacious box opposite the jury box, for the use of the counsel engaged in the trial. In many of the courts the seats for counsel are at the same distance from the Bench as in the Royal Courts; but in the Courts of Appeal the seats for counsel are relegated to a very great distance from the Bench. The desks provided for counsel are only used to place papers on while addressing the Court, and are not used for writing, as in England. The library and rooms for the Bar are admirable; but in the former a notice that counsel who desire to defend poor prisoners *gratis*, are requested to inscribe their names in the proper book, and another notice that gratuitous consultations are suspended during the vacation, rather shock our insular prejudices in favour of a fee, even with a dock brief. The library has books of infinite interest, notably many volumes of reports, both of French and Belgian decisions. The publishers surely must have taken the *Law Journal Reports* as a model. There are the titles at the head of the case, the head-note in one type, and the case in another. The facts of the case are given, then the judgment, and then the names of the *avocats*. Many volumes were printed in double columns.

The thought occurs, As these good people have a code, what do they want with volumes of reports? We had business in hand, in fact a commission, and some *avocats* of very great intelligence gave us plenty of law—pages and pages of it. They were asked, "Was there anything in the code about it?" "Well, yes, two lines that perhaps had some bearing on it." "Where, then, does all this learning come from?" "Why, from reported cases, to be sure." A lesson to codifiers. But, of course, a code can only propound general principles evolved from past experience. But legal decisions are evoked by the infinite variety of mundane circumstances, which are exactly what the wisest can neither foresee nor guard against. Circumstances rule man, not man circumstances. A code is only a common law, starting from a modern point.

The robes of the Bar are far superior to our own. The gowns very neat, clean, and fastened in front so as to lie close to the neck instead of falling away from the shoulders in awkward slovenliness, as here; adorned with the pretty white ermine tufts instead of the ugly cowl, and covering the body of the advocate, like our judges' robes, not leaving exposed to view that remarkable variety of shirt front and waistcoat which characterize without adorning the English Bar.

The earnings of the profession seemed to vary infinitely, as here. Rumour spoke of counsel who got together £4000 a year. But the Bench are paid on the most miserable scale. The usual stipend was £300 a year, the highest judge in the land receiving only £540. If the Palace of Justice had been erected at half its cost, and the other half had been invested and the interest devoted to the increase of judicial salaries, surely that would have been a wise reform. Horror seized us when an *avocat* informed us that some men who could not get on in the profession turned judges.

We were charmed to find how like a counsel in Belgium could be to an English barrister. Truly the same profession makes us more akin than the same nationality. We feel sure that they would all feel at home at Bar mess, even on Grand night.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF ABERDEEN.

Sheriff-Substitute BROWN.

TURNER v. MITCHELL & RAE.

Sale—Poinding.—This was an action at the instance of Colonel Turner of Turnerhall against Mitchell & Rae, Ellon, for £17, 4s. 8d., being the value of grain poinded by the pursuer, and thereafter sold and delivered to the defenders by William Lamb, farmer, Turnerhall. Colonel Turner pleaded that the sale, being in breach and violation of his poinding, was illegal, and the defenders, that as they had in ignorance of the poinding bought the goods and advanced to Lamb £7 on account of the price, they were not liable except for the balance. The Sheriff-Substitute (Brown) has given effect to the contention of the defenders in the following interlocutor:—

“Aberdeen, 19th June 1884.—Having considered the case: Finds—(1) That on or about 25th October 1883 the pursuer, Colonel Turner, executed a poinding upon a decree obtained in this Court of certain effects on the farm of Crosshill of Turnerhall, then occupied by William Lamb and Helen Mathewson or Lamb, and that an execution of said poinding was duly returned; (2) that on or about 30th and 31st day of October 1883, before a warrant was obtained for the sale of said poinded effects, the said William Lamb sold to the defenders, with whom

he had been in the habit of dealing, a portion of said pointed effects, viz. certain quantities of corn and bere or barley; (3) that the defenders received the grain in question into their granary in ignorance that they were pointed goods, and mixed the said grain with other grain in their possession; (4) that on said 30th October 1888 the defenders paid the said William Lamb a sum of £7 to account of the price of said grain, and obtained therefor the receipt produced in process; (5) that as soon as the defenders came to the knowledge that the grain purchased by them from the said William Lamb was pointed goods, they declined to make further payments to account of the price thereof, and to receive any further deliveries of grain from said William Lamb; (6) that the value of the pointed goods thus purchased by the defenders, and of which they obtained delivery, was £17, 4s. 8d. With reference to the foregoing findings, finds in law that the pointing in question did not transfer any right of property in the pointed goods to the pursuer, that the payment by the defenders of the sum of £7 to the said William Lamb is not reducible under the Statutes 1621 and 1696, c. 5, and that the defenders having bought and paid for the grain in question in *bona fide*, are not liable in repetition of the said sum of £7, but are liable to account to the pursuers for the balance in their hands of £10, 4s. 8d.: decerns against the defenders for said sum: finds the defenders entitled to expenses, subject to modification: allows an account thereof, etc.

“*Note.*—The parties have watched each other with some jealousy throughout this dispute, but notwithstanding all that was said at the debate as to disputed matters of fact, I think the reasonable interpretation of the statements in the record, taken along with the light thrown upon them by the correspondence, is that they are really in unison in regard to all substantial matters of fact, and that the case may proceed to judgment upon that footing. The only points which appear to be in controversy are the identity of the grain purchased by the defenders and a portion of the pointed goods, on which a payment of £7 was made to Lamb; but in the correspondence, at least the parties have assumed the first of these, and the document produced may, I think, be fairly enough held to instruct the second.

“At the debate the issues involved in the case were represented as raising very important questions in the law of debtor and creditor; and I am bound to say that I have felt them to be so, and that in the end I have been obliged to dispose of them without much assistance in the way of authority.

“The parties are agreed that two questions arise for judgment, viz. (1) the effect in bankruptcy of the transaction under which the defenders paid a sum of £7; and (2) the legal effect of the pointing executed by the pursuer. On the first of these I have come to be of opinion that the transaction in question was a cash payment, and is therefore not struck at by the statutes. But a point of considerable importance and difficulty arises under the second. The contention of the pursuer is that pointing operates a transfer of the property, and that is completed by the officer's adjudication. Here the pointing creditor had not the opportunity of obtaining a warrant to sell, because, before that could be done, the goods in question had been carried away and sold; but he maintains that they

could not be the subject of sale, because the pouncing entirely divested the debtor. This proposition was submitted mainly on the authority of an opinion expressed by Professor Bell to that effect in his Commentaries, and on the terms of the messenger's execution. In the fifth edition of the Commentaries, the last written by himself, Professor Bell distinctly lays it down that pouncing is a perfect diligence operating at once as a transference of the debtor's property to the pointer, and he takes exception to the judgment in *Tullis v. White*, 18th June 1817, where a different doctrine was adopted by the Court. It is important, however, to observe that in his fourth edition (1821) Professor Bell expressed the same opinion, and pronounced the same criticism on the judgment in the case of *Tullis*, in almost identical terms, and that his views were thus before the Court when deciding the cases of *Samson v. M'Cubbin*, 1822, 1 S. 407; *Lyle v. Greig*, 1827, 5 S. 845; and *Scoullar v. Campbell & Co.*, 1824, S. 77, in which these were practically rejected. The same doctrine is stated by Erskine, but is qualified by Mr. Macallan in his edition on the authority of the case of *Tullis* into the statement that 'the diligence is not complete or the property transferred until the sale be reported.' That the doctrine contended for by Bell in this matter had not obtained the Court's approval appears further from a note in Lord Ivory's edition of Erskine, in which he observes—'4. That the pouncing is not completed, nor the property of the pounced goods transferred, till after lodging the minute of sale with the clerk; *Tullis*, 18th June 1817; the doubts expressed by Mr. Bell, Com. ii. 69, as to the soundness of this construction of the statute having since been disregarded by the Court, *Samson*, *supra*.' Under the old form of pouncing the debtor's goods were twice valued, it being only after the second appraisalment that they were adjudged to the pouncing creditor and delivered to him, and I think there can be no doubt that in the more recent practice the sale takes the place of the second appraisalment.

"A great many tests might be suggested of the unsoundness of the proposition that the mere fact of pouncing transfers the property. If, for example, the goods being in the custody of the debtor were destroyed by some accidental cause, could it be argued that the debt would be wiped off, and that on the principle of *res perit domino* the goods would be lost to the pouncing creditor? Or again, if the pouncing creditor failed to follow out his diligence by sale, could not another pointer intervene and cause the prior diligence to lapse? Or again, what is the meaning of the provision in the statute enacting certain penalties against the person who unlawfully intromits with pounced goods, if the contention be well founded that that creates a *vitium reale* nullifying all subsequent transactions regarding them? The law of theft, which would be qualified if the property were transferred, would be sufficient for that purpose. Or, once more, how can the provision of the 19th section of the Personal Diligence Act, that the pouncing creditor may *purchase* the goods at the sale, be read consistently with the view that prior to the sale a right of property has passed to him?

"In regard to the argument founded on the terms of the messenger's execution, it is, I think, sufficient to point out that in substance they correspond to the language used in the writ of execution under the old

form of pointing, after the second appraisalment had taken place and the goods were delivered over to the creditor. But under the system of pointing at present in force there is no delivery to the creditors of the pointed effects until a sale under a separate warrant has taken place, and therefore it may be fairly argued that the words of adjudication are mere words of style, which are of no importance after the reason for using them has ceased to exist. But separately there seems to be no authority in the Act 33 Geo. III. c. 74, by which the old system of pointing was first altered, nor in subsequent Acts 54 Geo. III. c. 137, and 1 and 2 Vict. c. 114, for the use of such words, and in any view it seems to be quite clear that the decided cases exclude the contention which is pressed on this authority.

"The conclusion accordingly at which I arrive is that the grain in question was not transferred to the pursuer at the time it was purchased by the defenders. He had no doubt laid a *nexus* upon it, and the only remaining question is whether this inferior right is entitled to prevail over a *bona fide* purchaser for a fair price, in which position it is conceded the defenders are. It seems to me that it would be extremely hard if any such doctrine required to be affirmed. No doubt the pointing had the effect of making the debtor a notour bankrupt in a legal sense, but the defenders were not aware of that fact, nor had they any means of knowing it, and a messenger's execution does not operate, and was not intended to operate, an act of publication such as takes place in sequestration.

"I assume the defenders to concede, in the circumstances in which the case stands for judgment, that they must pay over any balance in their hands of the price of the pointed goods to the pursuers; and I apprehend that it is only in regard to a second payment of the sum of £7 that they are entitled to be protected, and that they are not entitled to set off either the general balance with which their statement of accounts starts, or the price of the sacks in which the grain in question was conveyed to their stores. As to the question of expenses, I have felt some difficulty, but as the question which has been really litigated is the legal effect of a pointing not followed by a sale, I do not see how the result of expenses to the defenders can be stayed, subject to some modifications for their not being found entitled to retain the full amount they claim.

(Initialed) "W. A. B."

Act. Milne—Alt. Rae.

The case has been appealed to the Sheriff.

SHERIFF COURT OF LANARKSHIRE AT GLASGOW.

Sheriffs LEES and CLARK.

EDWARD FULTON *v.* JAMES ANDERSON.

Damages—Liability of Landlord of Property for stair falling and party injured while going up.—This is an action at the instance of Edward Fulton, labourer, 28 M'Alpine Street, Glasgow, against James Anderson,

tea agent and coffee merchant, 76 West Howard Street, Glasgow, for £1000 damages for injuries he received by the fall of a stair in defender's property at 90 Maxwell Street on the 3d October 1883. The stair fell while the pursuer was carrying up a back-load of coals to the warehouse of Messrs. Allan & Orr, hat manufacturers, on the top flat. When he had partly ascended the stair it suddenly collapsed, and he was buried in the *debris* that fell to the bottom. The pursuer was seriously hurt in his person, both internally, and on the head, face, neck, back, shoulders, legs, and other parts of his person. So much bruised was his left leg, that it had to be amputated a little below the knee on the 17th November. On behalf of the pursuer, it was submitted that the accident was due to the defective construction of the stair, the stone steps used not being of sufficient strength for the breadth of a stair that was a hanging stair; or that the defender, or those for whom he was responsible, was culpably negligent or careless about improper workmanship in making alterations on the stair—the steps having become much worn from constant use, several of them were faced with Caithness pavement, rendering the structure insecure by lessening the thickness of the steps.

The defender pleaded (1) that the pursuer's statements were unfounded; (2) that the pursuer caused the accident by his own negligence; (3) that the accident happened from circumstances unknown to and beyond the control of the defender and his authors and predecessors; and (4) that pursuer agreed to accept £30 in full of his claims.

After a long proof, Sheriff Lees issued the following interlocutor and note, finding defender liable to pursuer in £150 of damages, and expenses:

"*Glasgow, 7th March 1884.*—The Sheriff-Substitute having considered the cause, Finds that the defender is, and for the last five or six years has been, proprietor of the tenement in which No. 90 Maxwell Street is situated: Finds that the said tenement was erected about twenty-eight years ago, and that the stair by which access is had to the business premises in the tenement having gradually got worn away, and frequent complaints thereof been made, the defender about three years ago employed a slater to renew the surfaces of the steps by indenting or cutting out a portion of the worn stones, and replacing it with fresh Caithness flag-stones: Finds that said stair is a hanging stair of unusual breadth and consisting of three flights, and that the indenting by the defender was done to every step of these three flights: Finds that the stair in consequence of the cutting to which it was subjected was much weakened, and that on various occasions the indentations became loose, and that the stair was unfit to stand the strain to which in the ordinary course of traffic or accidentally it might be exposed: Finds that on 3rd October the pursuer was engaged along with another man in carrying coals to the premises occupied by Allan & Orr on said stair: Finds that while the pursuer was carrying up a bag full of said coals weighing about one cwt., the stair suddenly gave way with him, and he was precipitated along with two flights of the stair to the bottom of the tenement, and was so seriously injured that he required to remain for a period of fourteen weeks in the infirmary, and had eventually to have his left leg amputated below the knee: Finds that the defender has failed to establish the com-

promise of the matter alleged by him, or that the pursuer contributed to his injuries by his own negligence : Finds that the pursuer, having been injured through the fault of the defender in neglecting to have his stair when repaired made of sufficient strength to stand the strains to which it might under ordinary use be exposed, is entitled to compensation from the defender for said injuries : Assesses the amount of such compensation at the sum of £150 : Repels the defences ; and decerns against the defender for payment of said sum to the pursuer, with the legal interest thereon from the date hereof till payment ; and finds the defender liable to the pursuer in his expenses.

(Signed) J. M. LEES.

“ *Note.*—The mere fact of the stair giving way does not itself constitute a ground on which pursuer can demand compensation. He must do more. He must prove that there was negligence on the part of the defender. But it appears to me that such negligence is pretty clearly proved. The stair was at the time when it was repaired twenty-five years old. It was exposed to many risks, and from the great number of working people that had to use it every day it was essential that the stair should be kept up to a level of strength adequate to the strain it might be expected to have to bear. It was the access for business purposes to two or three establishments. Heavy goods had to be carried up it, and also coals. It appears to me that it was therefore incumbent on the defender to act with much care in the repair of this stair. A good deal of evidence was led to show that it was improper to employ, as he did, a slater at such a job. But about as much evidence was led to show that a slater is quite suited for such a purpose, and that it is matter of common practice to employ such a tradesman for indenting a stair. I do not think, therefore, that there is any negligence proved on this point. But it is very plain that the job required to be executed with much care, and was at the time the source of a good deal of anxiety to the workman who was doing the work. Now, the point for the pursuer here is that the defender, knowing the strain his stair required to bear, and knowing that the cutting away of the stone was certain to weaken it, was bound, for the safety of the lieges who used it, to see that it was made of proper strength. It is clearly proved that the indenting of even a few steps on a hanging stair is a ticklish job. But when every step of three flights had to be indented, the risk became the greater. From top to bottom there was thus not a single step which retained its original strength, and it is shown that this stair was of unusual breadth. The question then is : Did the defender take proper precautions in regard to his stair ? Now, what he did was, he resolved to have every step indented, and he asked a slater how much he would charge for doing this. No further investigation was made, but the defender appears to have acted on his own judgment that the course he intended to take could be taken with safety. He was thus on his guard as to the risk his stair might cause. If, therefore, it gave way with the weight of a man carrying a hundredweight of coals, then *res ipsa loquitur*, a stair which gives way under such conditions is certainly not what it ought to be. I have already pointed out that this stair had often a number of work-people on it at the same time, and this shows the danger they ran. But the defender seeks to show that the cause of the stair

giving way was that the pursuer let his bag of coals fall. Well, even if that were proved, I am not sure that it could be said with propriety that a stair which had to carry the traffic this stair had to do was adequately fitted for the purpose if it could not stand the strain of a bag of coals sliding off a man's back on to it. But as matter of fact it is not only not proved that this occurred, but it is, I think, sufficiently proved that it did not occur. No one saw it occur, and four people saw that it did not occur. The three Allans, who were the only witnesses that favoured the defender's view, say they heard a long rumbling noise which they thought might be the pursuer's coals falling, and that then they heard the stair giving way. But, as I have said, none of them saw this; and it is proved that as matter of fact the first thing that gave way and went over was the railings of the stair, it is possible enough that it was this rattling of the railings that the Allans heard and mistook for the fall of the coals. On the other hand, the pursuer says the coals did not fall off his back. The man Clark, who was in front of him, says the same; and the two girls, Agnes Carmichael and Amelia Sinclair, who were on the stair at the time and fell with it, are able to speak to the matter. The former says that the stair broke at her feet when the pursuer was just a few steps in front of her, and that none of his coals fell. Now if they had fallen I do not see how she could have failed to know. Then the girl Sinclair says she had just passed the pursuer and thus could not see whether his coals fell, but she entertained no doubt that if they had fallen she must have heard them, and is positive that they did not fall. Thus the slender reed on which the defender leans for his defence fails him, and nothing remains to meet the case that the pursuer has established, namely, that without fault on his part he has been injured through a stair giving way, which the defender had operated on in a way that, as the result shows, left it of insufficient strength for the purposes for which it was required. As regards the amount of damage, it is somewhat difficult to decide what is proper in the circumstances. The pursuer had in a previous accident got his right hand injured. Now he has lost half of his left leg. He is thirty-two years of age, and it is unfortunately beyond doubt that he will have much difficulty in getting any means of livelihood. Under all the circumstances, if I have erred as to the amount of compensation he should get, I rather think the error is towards giving him too little.

(Intld.) J. M. L."

The defender appealed the case to Sheriff Clark, who, after having heard parties' procurators on the whole case, issued the following interlocutor, adhering, with additional expense:—

"*Glasgow, 26th June 1884.*—Having heard parties' procurators, and considered the evidence and whole process: For the reasons stated by the Sheriff-Substitute, adheres to the interlocutor appealed against: Finds the defender liable in the expenses of the appeal; and decerns.

(Signed) "F. W. CLARK"

Act. Wallace & Wilson—All. Patrick Barr.

SHERIFF COURT OF PAISLEY.

Sheriff COWAN.

RODGERS v. CRAIG & SMITH.

Partnership—Joint Adventure.—The following interlocutor, issued by Sheriff Cowan, fully narrates the facts of this case :—

Paisley, 19th June 1884.—Act. Wilson ; Alt. Faulds.—Having heard parties' procurators, and considered the closed record, proof adduced, and whole process—Finds in fact, that, in or about July 1883, the defenders entered into a joint adventure as stevedores for the loading and unloading of vessels sailing from the river Clyde ; that the arrangement between them was that the defender Craig should find the money, and the defender Smith should find the work ; that no power was given to either of the joint adventurers to borrow money ; that the said defenders did, in pursuance of said joint adventure or joint trade, load several large vessels and small steamers ; that in each case the money required was provided by Craig, and at the conclusion, when the shipping owners paid the accounts, there was a settlement between Craig and Smith, when the advances made or provided by each for that vessel were repaid, and thereafter the balance equally divided between themselves as profit : Finds that on 16th November 1883, the joint adventurers squared up and settled the accounts connected with the loading of the *Peeblesshire*, the defender Craig then receiving payment of £45 to recoup advances made during the loading of said vessel : Finds that while he now says that that sum had been lent by the pursuer to him, he never mentioned this fact to Smith, and he did not apply said sum in repayment to pursuer of the advance : Finds that the defenders advertised on 10th November that their partnership had ceased, and after that date the only vessel loaded by them in conjunction was the *Duke of Argyle*, but the whole papers and contract were in name of the defender Smith : Finds that there was a final settlement of accounts between them after the loading of that vessel embodied in Nos. 12 and 13 of process, whereby the defender Smith paid to Craig the sum of £20, and handed over to him all the plant : Finds that at that settlement Craig assured Smith that there was no other claim against the joint adventure : Finds that two days later the pursuer for the first time claimed from Smith payment of the I O U, No. 4 of process : Finds that while it bears to be for an advance of £80, and the said sum is in the record said to have been advanced on 26th November 1883, only £15 was at that time advanced by the pursuer, the remaining sum of £65 being contained in a former I O U, which he says Craig had signed in name of Craig & Smith : Finds in law that the said document of debt is not valid to constitute a claim against the joint adventure, and that the defender Smith is entitled to be assolizied from the conclusions of the libel, therefore assolizies the defenders Craig & Smith and James Smith from the conclusions of the libel : Finds them entitled to expenses, allows them to

give in an account thereof, and remits the same when lodged to the auditor of Court to tax and report, and in the absence of the defender Joseph Craig decerns against him in terms of the prayer of the petition : Finds the pursuer entitled to expenses as against him, allows an account thereof to be given in, and remits the same when lodged to the auditor of Court to tax and report, and decerns.

(Signed) HUGH COWAN.

Note.—A joint adventure, in which one party agrees to furnish labour and another capital, is well known in the law of Scotland, *Brock v. Brown* (1696), M. 14,568 ; *rationes decidendi* in *British Linen Company v. Alexander*, *infra*. In such a contract the working partner is not liable for any advance made to the other to enable him to supply the capital. See the strong case of *Ker v. Bryson* (1747), M. 14,567 ; also, *Donaldson v. Paul* (1760), M. 14,609. It is only where it clearly appears that the advance obtained is a partnership transaction in pursuance of the business of the copartnership that a different rule obtains ; *British Linen Company v. Alexander* (1850), 15 D. 277. In that case, however, the Judges fully recognised this principle. In the present case the arrangement between Craig and Smith is very distinctly proved. Smith had nothing to do with the finding the money required in the business. That was undertaken by Craig, and in all his arrangements, if he chose to borrow, he did so on his own credit and was not entitled to pledge the credit of Smith. In the matter of the I O U now sued for, even if at its date he should be held entitled to pledge the credit of the company, he could only do so for the money then obtained (£15), the rest of the £80 being a previous debt which he was *in mala fide* to carry forward, he being already paid the whole of the advance which that sum represented. The pursuer has since, through the sale of the plant, realized £20, so that his claim on the I O U, should it be sustained to the extent of £15, is extinguished. The Sheriff-Substitute, however, humbly thinks that the present case falls within the same category as *Sinclair's, Moorhead, & Co. v. Wallace & Co.*, 1880, 7 R. 877, and that the defender is entitled to absolvitor.

(Intd.) H. C.

The judgment was acquiesced in. *Act. Wallace & Wilson—AU. H. B. Faulds & Gibson for Craig & Smith and James Smith.*

THE JOURNAL OF JURISPRUDENCE.

THE PRESENT POSITION OF AUSTIN IN ENGLISH JURISPRUDENCE.

THE lectures of Austin have always, and in many respects have rightly, held the highest place among the text-books of English jurisprudence.

Turning aside from the well-rounded periods and courtly phrases of Blackstone, seeing "an apology for tyranny" in every page of Hobbes, shrinking from the labour of working down through the dross of Bentham's Gallicisms to the rich metallic vein of wisdom which lay beneath, the English lawyers found in the fragments of Austin the outlines of a theory capable of being studied, understood, and applied to practice.

Men who had been trained to extract the *ratio decidendi* from a mass of seemingly irreconcilable judicial decisions, would no doubt soon master *The Province of Jurisprudence Determined*, and *The Relation of Law to its Sources and to its Objects*.

Terse in style, clear in meaning, severe in logic, by comparison with his predecessors, the great analytical jurist still looks down "from his inner judgment-seat," and gives the laws to the Universities of Oxford, Cambridge, and London, as well as to the Council of Legal Education which he begat.

The metaphysical insight, however, of Professor Holland¹ and Mr. Markby,² and the historical researches of Sir Henry Maine,³ have so far corrected and defined the ideas of Austin that we might almost apply to their labours the remark of Rabelais on the fate of the *Corpus Juris* in Italy—"the glosses are more important than the text."

My object in this paper is exegetical rather than critical. I wish, in the first place, to state briefly some of the chief Austinian doctrines; and in the second place, to inquire how far they have

¹ *Elements of Jurisprudence*.

² *Elements of Law*.

³ *Ancient Law; Early Institution; Village Communities*.

been accepted, rejected, or modified by the writers in question. In carrying out this analysis of Austin, I shall restrict myself to—

1. His Theory of Utility.
2. His Criticism on Blackstone.
3. His Theory of Political Sovereignty.

1. The theory of utility, elaborately worked out and defended by Austin,¹ may be summarized in a few sentences. God desires the greatest happiness of His sentient creatures. Certain human actions tend to increase, certain other actions tend to lessen it: the former are commanded, the latter are forbidden by God, who has given to man reason, observation, and memory to aid him in discovering His unrevealed will. The test of utility must therefore be the final tendency of actions—the probable effects on the general happiness if such actions were universal.

To trace the value of utilitarianism for juristic purposes,² or to criticize its practical operation in international law, would be merely to offer a feeble paraphrase of the arguments and opinions of Dr. Brown, Dugald Stewart, and Professor Lorimer. I shall try, if possible, to add something new to the controversy by exhibiting Austin's favourite conception in its modern English dress. The following criticisms are drawn from the works of Mr. Markby and Sir Henry Maine.

*The theory of utility is not historical.*³ "A conviction of utility was not the original moving cause of the introduction of all, or even of any very large proportion of existing laws." Corporations, monopolists, and privileged individuals in all ages have held, like Sir Alexander Wedderburn, that utility is "a dangerous expedient," and have been only too successful in inducing Governments to share the same opinion.

The fact that Austin himself puts a non-historical theory in the foreground of his analysis of Positive Law, materially weakens, if indeed it does not destroy, the effect of his remarks on the Social Compact and the Law of Nature.

The theory of utility, moreover, is unscientific: it is eked out by the moral sense,⁴ and it might be made to suit any system of jurisprudence.⁵

*Finally, the theory of utility is quite irrelevant as the preface to Austin's analysis of Positive Law.*⁶ The lines which Austin lays down for himself are these: in determining the province of jurisprudence we deal with two, and two only, elementary ideas—"sovereign" and "subject." Positive Law is a command—a signification of desire by the former to the latter, accompanied by the power and the purpose to make it effectual. This com-

¹ Lectures ii. iii. and iv.

² *Vid.* Blackie, *Four Phases of Morals*, as to Utilitarianism.

³ Markby's *Elem. of Law*, xi. § 420.

⁵ Maine, *Early Inst.* xii.

⁴ Austin, Lectures ii. iii. iv.

⁶ *Ibid.*

mand derives its sanction from the essential, illimitable force of sovereignty, and not from the character of the ends which it is destined to achieve. The subject in fact obeys the command, not because moral sentiments or careful inductions teach him that it is likely to be universally beneficial, but because he is a subject.

To take account of utility at all is to admit a censorial element into an expository treatise, and to abandon the basis on which the whole system of Positive Law is made to rest.

2. Sir William Blackstone fared badly in the hands of Austin. "Trained¹ to wield the logic of the schools with scholastic adroitness," revolting against the "tattling style and moral common-places" which disfigure the Commentaries, deeply convinced that the preliminary attempt to lay down the principles, and to divide the subject-matter of law, was artificial and untenable, Austin tracked the unhappy Justice from volume to volume, and inflicted wounds upon his popularity from which it will never recover.

His criticism, however, on the definition of custom, and the distinction between civil injury and crime, has been practically repudiated by Professor Holland and Mr. Markby.

Custom, in Blackstone's opinion, derives its binding force from the *consensus utentium* during a period so long that "the mind of man runneth not to the contrary." "Quid enim interest an suffragio populus voluntatem suam declaret an rebus ipsis et factis?"

Custom, according to Austin, becomes law only when recognised by the Court, and its legal character dates from the moment of such recognition. Professor Holland² in quoting this view holds that if the custom is reasonable and immemorial, the recognition by the Court is retrospective. If this limitation is to be accepted, I can see no difference between the customary law of Blackstone and the "*Jus moribus constitutum*" of Austin. It is an unconscious surrender of that abstract theory of sovereignty whose scientific value has been so highly praised.

A civil injury, said Blackstone, is a wrong done to an individual; a crime is an offence committed against society. Rightly perceiving that crimes are committed against individuals, and that civil injuries are indirect wrongs to society, Austin proposed a substitute for Blackstone's illogical definition. A crime, he said, is an offence prosecuted by the State; a civil injury is a wrong prosecuted by a private individual.

Mr. Markby, in his *Elements of Law*,³ has industriously shown that the distinction drawn by Austin between civil injury and crime has no greater claim to scientific exactness than the distinction drawn by Blackstone. Like all of Austin's theories, it is not historical. Recent investigation into the facts of primitive society has proved nothing more clearly than this, that simple retaliation long preceded criminal prosecution; that the aggrieved party was

¹ De Quincey, *Confessions of an Opium-Eater*.

² *Jurisprudence*, v.

³ xi. and xii.

left to redress his own injuries, whether done to his person or to his property; that Courts of law, when they did interfere, interfered in the name and as the representative of the plaintiff; and that the measure of punishment was determined, not by any speculative notions as to an offence against the State, but by the degree of satisfaction which the plaintiff would have exacted for himself.

Early procedure was not the exercise of absolute force by a sovereign of unlimited power, but the gradual assumption of authority by the Courts through the voluntary submission of plaintiff and defendant to their arbitration.¹ But, again, every Court enforces its decrees either by intermediate or by ultimate sanctions. The former are commands, the latter are punishments. The ultimate sanctions are applied primarily and directly by the criminal, the intermediate sanctions by the civil Court; but whenever the intermediate sanction fails the civil Court has no resource but to fall back on the ultimate sanction. It would thus appear that, in their final issues, civil are not far removed from criminal proceedings.

3. I come now to consider the Austinian doctrine of Political Sovereignty as it is presented to us in the *Lectures on Jurisprudence*, and in *The Early Institutions*² of Sir Henry Maine.

When a determinate human superior, "not in the habit of obedience to any like superior," himself receives habitual obedience from the bulk of a given society, that is an independent political society, in which the superior is sovereign, and the society is subject. The marks of sovereignty, and inversely of subjection, therefore are—determinateness, habitual obedience within the society, and habitual independence beyond it.

The long chapter in *The Early Institutions* which Sir Henry Maine devotes to the analytical jurists may be conveniently divided into two parts—(a) a rearrangement, and (b) a criticism of the Austinian theory of Political Sovereignty.

(a) In his eagerness to expose the fallacies of Blackstone's sketch of "Laws in general," Austin developed his own theory, chapter by chapter, in the very order which he was condemning. Thus the theory of sovereignty was postponed to an examination of the facts and principles which it alone could explain and reconcile. The chief points in Austin's conception are these—there is force in every society: this force is vested in a sovereign (individual or number): the sovereign power is limited by a mass of moral and constitutional influences, but in pursuing his *scientific process* Austin considers sovereignty in the abstract apart from those influences, *i.e.* apart from the individual history of each community. Admit those assumptions, says Sir Henry Maine, and all of Austin's positions follow as matter of course. Law is the creature of the sovereign; jurisprudence is the science of Positive Law alone; whatever the sovereign permits he commands; cus-

¹ *Vid.* Hunter, *Roman Law*,—Procedure.

² *Early Inst.* xi. xii.

omary law derives its sole sanction from the sovereign power, which is incapable of legal limitation, and morality influences men only through their respect for public opinion.

(b) Sir Henry Maine then proceeds¹ to define the limits of the Austinian theory of Political Sovereignty. It is of value only in those countries and States which, differing originally from the Roman and Oriental Empires, have been subsequently influenced by Roman legislation. The States of the ancient world made no distinction between making, declaring, and carrying out a law; legislation appeared as the primitive communal forms were broken up; thus the Indian communities were never permanently altered by Mogul or Mahratta, while, in the English village community, the king's law gradually gained the ascendancy over local customs and habits. The legislating force in Europe was the Roman Empire. There are two types of political society; one is governed by usages, and gives an occasional submission to a leader who taxes but never legislates. Here we have customary law, and its sanctions are superstition, blind instinct, or opinion. The other is governed by a sovereign who legislates directly. Here we have the Austinian coercive force; the generality, indifference, and inexorableness of laws are due entirely to the great area over which sovereignty extended, and to the minute groups into which it was divided. The order of primitive society was monotony caused by custom, not produced by law.

Austin's theory does not apply to a *state of anarchy*, where the question of sovereignty is being fought out, to a *state of nature*, to societies such as the *Patriarchal Family*, where the application of the terms "subject," "sovereign," "political society," would be inappropriate, because of their insignificance, and to certain societies *where there is a sovereign*. Thus Runjeet Singh, conqueror of the Sikhs in the Punjab, the absolute master of his kingdom, destroying villages, administering justice, raising taxes, yet never made in the Austinian sense a single law, but left his subjects to be governed through domestic tribunals by immemorial customs. In the binding force of these customs Runjeet Singh believed as strongly as his subjects. The conclusion to which Sir Henry Maine seems to come is that the Austinian theory of Political Sovereignty, although incorrectly stated and inapplicable to the majority of existing societies, is unassailable, because it satisfies the scientific method. From this conclusion I venture respectfully to differ. I submit that Logical Method² is a means and not an end, and that no process of reasoning can be called scientific unless it yields scientific results. Now, one of the principles which logically follows from the theory under consideration, and which underlies the popular system of international law, is the equality of all States.

I wish, in drawing these remarks to a close, to indicate briefly

¹ *Early Inst.* i. 13. i.

² Cairnes, *Char. and Logical Method of Pol. Econ.*, works out this idea.

some of the consequences of the application to practical questions of this "fundamental maxim of international law."

Intervention has been defined¹ as "an act of high policy . . . above and beyond the domain of law, . . . whose essence is its illegality, whose justification is its success."

Kent, after laying down the general rule that intervention is indefensible, proceeds at great length to show how the Five Powers formed themselves into a Board of Control over the affairs of Europe, and how they have systematically interfered with each other's internal and external interests from 1815 to the present day. Non-intervention has been the exception, and intervention the rule.

By treating intervention as a breach of international law, and by ignoring the fact that intervention has played a more important part than any other doctrine in the history of international law, Kent falls into the absurdity of asking his readers to accept a general principle which has been uniformly contradicted in practice.

What claim in theoretical statement the maxim of the equality of States has to the title of scientific, I fail entirely to see. The very first law of scientific definition is that the terms employed should not be ambiguous. What is meant by saying that "States are equal"? Does it mean that they are equal in size, in strength, or in rights and capacities? Or does it simply repeat the truism, that every State has rights, and is entitled to have them respected?

Recognition is accorded or refused according to the caprice of individual nations. It has therefore no sound position in a system of international law; and no general rules can be laid down to define the conditions on which it shall be granted or withheld.

A graduated scale of *political precedence* becomes impossible, for the ambassadors, consuls, and plenipotentiaries of all States are equal, and entitled to equal consideration. In describing the petty behaviour of the chief European representatives at Ryswick in 1697, Lord Macaulay wrote:² "The imperial ambassadors claimed a right to sit at the head of the table. The Spanish ambassador tried to thrust himself in between them. The imperial ambassadors refused to call the ambassadors of Electors and Commonwealths by the title of Excellency. 'If I am not called Excellency,' said the Minister of the Elector of Brandenburg, 'my master will withdraw his troops from Hungary.' The chief business of Harley and Kaunitz was to watch each other's legs. Neither of them thought it consistent with the dignity of the Crown which he represented to advance towards the other faster than the other advanced towards him. If, therefore, one of them perceived that he had inadvertently stepped forward too quick, he went back to the door and the stately minuet began again." This solemn trifling may indeed prove that "international law, like other law,

¹ *Letters of Historicus.*

² *History of England*, ii. 623-25. Longman.

has its chicanery and its technical forms, which may too easily be employed so as to make its substance inefficient." But it seems to me to prove something else. It seems to prove that this fundamental maxim of the equality of nations and their representatives has been rejected by the common sense of individual States.

While international law is treated merely as a collection of the rules of positive morality, with no sanction but public opinion, while it is believed that practice, "founded" as it is on fewer and less accurate observations and on reasonings less perfect and exact" than theory, can of itself create a coherent and consistent body of law; while vague maxims, contradicted at every turn in the political history of the nations of Europe, are substituted for careful investigation into the facts and development of national life, international law must still occupy its anomalous position in legal science, international tribunals will have no sanctions to enforce their decrees, and international arbitration will have little prospect of final success.

MR. BRIGGS' BABY.

AMONG the many social and political changes of the last fifty years, there is none which has done more to revolutionize the whole fabric of human society than the remarkable movement which culminated in the complete emancipation of the female sex. To people of our day a world in which the claims of woman to an equal share with man in the work and the responsibilities of life, and in the control and management of the State, the county, and the parish are not fully recognized, is as unrealizable as a world without the railway, the telegraph, and the electric light. Yet within the memory of many who are still living, ay, even of many who are not yet accounted patriarchs, women were not only excluded from Parliament and debarred from the right of the franchise, but were forbidden, either by law or by public opinion, to enter the medical profession, to practise at the Bar, to take part in the work of the ministry, or to engage in trade and commerce—in fact, down almost to the close of last century, it was impossible for a female to earn her livelihood in any other than a menial calling. Even for the assertion of her supremacy in the control of the affairs of her own household and family, woman was then entirely dependent upon her own resources. It was idle for her to appeal to the law courts, which were then little more than instruments of oppression in the interests of husbands. As an illustration of the opinions which then prevailed within the precincts of the Court of Session, it may be noted that so late as 1884 the Faculty of Advocates solemnly expressed their approval of the odious doctrine that a wife who, for reasons satisfactory to herself, absents herself

¹ Cossa, *Guide to Pol. Econ.* p. 64.

from the society of her husband is not entitled to the custody of her children. We have been assured by some who were present on that occasion that the majority of the Faculty seemed to listen with complacency to the assertion of such antiquated and barbarous doctrines as that the husband is the head of his wife, and ought to be lord and master in his own house.

Now-a-days such things are all happily changed. Woman not only enjoys the franchise, but she has long since asserted her right to take her place amongst the legislators of the country. She has found her way, too, not only to the dissecting room, but to the pulpit, the Bench, and the Bar. Most of our manufactories are now both owned and managed by women, and it is estimated that fully two-thirds of the business of the Stock Exchange is conducted by female brokers. But it is within the precincts of her own household and family that woman has attained her most signal triumph. In other matters no attempt has ever been made to reduce man to the position once occupied by woman. The female sex has always ungrudgingly recognised the right of the males to an equal share with themselves in the conduct both of private business and of public affairs, but very early in the progress of the movement it came to be clearly seen that an exception must be made in regard to the control of the affairs of the household and family. It was felt that there were practical difficulties in the way of assigning equal authority to both spouses within these spheres, and the moment this came to be fully realized there could be little doubt as to which sex was entitled to paramount authority within the family. No kindly revolution in nature had kept pace with the revolution in human society. It still remained the inexorable fate of the female to bear alone the woes and troubles of child-bearing. No scheme could even be suggested by which these trials should be shared equally by both sexes. Even science in the full flush of her nineteenth century triumphs stood aghast at that problem. It became clear, therefore, that on the very principle of equality woman was entitled to pre-eminence in the control of the household and family. In order to deprive man of all undue advantage, it was necessary to provide some compensation to woman for the burden of which nature refused to relieve her, and what could more readily suggest itself than that to woman should be assigned the exclusive control of that family which she had brought forth in sorrow?

This doctrine was first authoritatively expounded in the celebrated case of *Briggs v. Briggs* (June 10, 1911, 9 Miss Murray, 785). The case is an exceedingly instructive one in this branch of the law, and it derives additional interest from the fact that the now well-recognised right of the Court to regulate domestic questions arising between spouses living in family was here first clearly established.

Mr. Briggs' bachelor name was Thomson. In his early years he

had been an active and even an enthusiastic promoter of the movement for female emancipation; but his was one of those minds so timid and constitutionally conservative that they recoil from the legitimate consequences of movements which they have themselves initiated. As the sequel will show, Mr. Briggs, after having helped to give vitality to this peaceful revolution, subsequently did his utmost to arrest its progress and to resist its inevitable results.

Mr. Thomson had already reached the ripe age of forty-seven when he first met Miss Higgins, his future wife, then a girl of thirty-two. Like Mr. Thomson, Miss Higgins had always been an ardent advocate of the rights of the female sex, but unlike Mr. Thomson, she never shrank from pushing her theories to their legitimate issue. It is unnecessary for our present purpose to narrate the circumstances which brought Mr. Thomson and Miss Higgins together, but two incidents in the course of their courtship may be noted as throwing some light upon the perverse and impracticable temperament of Mr. Thomson, which subsequently gave rise to such grievous family troubles. As the patrimonial rights of woman are now amply secured by law, Miss Higgins did not desire any settlements on the part of Mr. Thomson, but with singular obstinacy Mr. Thomson insisted upon the execution of a mutual settlement to protect, as he avowed, the claims of his own family. Mr. Thomson was the proprietor of a considerable estate in the country, besides some valuable house property in Glasgow. By virtue of the Act of 1893 this heritable property would on Mr. Thomson's decease have passed absolutely to his widow. But Mr. Thomson desired to make some provision which would limit the right of his widow to a mere life interest in the event of there being no issue of the marriage, and so to secure the reversion to his own brother. To this preposterous proposal Miss Higgins and her friends would not for one moment listen. It was pointed out to Mr. Thomson that such an arrangement would be quite inconsistent with the now clearly established principle of equality between the sexes, for in the event of his wife predeceasing him, her property, consisting of four £100 shares of the Egyptian Loan of 1884, together with her trinkets and body-clothes, would pass absolutely to the surviving spouse. Satisfied of the futility of further resistance, if not convinced by these arguments, Mr. Thomson was obliged to give way, and accordingly no settlements were executed. Another serious difficulty, however, arose in connection with the choice of the matrimonial name to be borne by the spouses. The chivalrous custom now so prevalent, by which the husband takes the family name of the wife, did not then obtain to any great extent, and indeed Mr. Thomson felt so strongly upon the subject that he threatened to break off the engagement and face all the consequences rather than adopt the name of Higgins. Miss Higgins was equally determined not to recognise any supremacy in man, as she felt that she would be doing by taking

the name of her husband. But again the principle of equality was appealed to with the happiest results. A grand-aunt of Miss Higgins had married a gentleman of the name of Briggs, and Mr. Thomson had a second cousin of the same name. Accordingly it was suggested that this neutral name should be adopted by the couple upon marriage, and to this proposal both parties at length agreed.

All the preliminary details having been thus satisfactorily arranged, the marriage took place. From the very outset the alliance proved rather an unhappy one. Again and again the perverse old-world ideas of Mr. Briggs set themselves in opposition to the claims and rights of his wife. He grumbled when she insisted upon having a pass-key; he complained bitterly of her dining so often at the club; it was long before he became reconciled to the loss of the key of the cellar; and once or twice when there was company at dinner, he nearly occasioned an explosion by suggesting that the gentlemen might linger for a few minutes longer over their wine after the ladies had left the table. It is due, indeed, to Mr. Briggs to point out that there were one or two requirements of wedded life to which a man of his age and formed habits found some difficulty in adapting himself. The arrangement suggested by Mrs. Briggs was that the spouses should each have their week's housekeeping, and that whosoever week it happened to be free should be responsible for the week's stitching and darning. This arrangement at first occasioned Mr. Briggs very considerable inconvenience, and for a month or two he was continually in hot water with his wife on account of some ridiculous mistake which he had made. Something was always being forgotten to be ordered—butter, coals, bread, or some other necessary. On one occasion, for example, Mr. Briggs ordered a large quantity of preserving cherries, and entirely forgot the sugar until he went to the kitchen in the evening at an hour when every shop was shut. Nor was he more happy with the needle and scissors. Buttons he used to manage pretty well, but he made sad work with the darning; and as he was colour-blind, he was constantly being rated by his wife for having matched the worsted wrong in repairing her stockings.

It was not, however, until the baby was born that a serious crisis arose in the domestic establishment of the Briggs'; but from the moment when that unhappy boy first saw the light, all peace was banished from the house. To many of his wife's requirements Mr. Briggs yielded a reluctant compliance. He consented to have the library turned into a nursery, and he agreed to give up smoking lest the fumes should injure the infant's eyes. With infinite pains he committed three lullabies to memory; and he took his share in rocking the child to sleep, coaxing it when fretful, and watching it when wakeful or sickly. His newly-acquired command of the needle was turned to good account, for during his wife's convalescence he undertook the entire charge of the preparation and

repair of the baby linen. Every Saturday night nurse was allowed to go home to see her friends, and every second Saturday—turn about with his wife—Mr. Briggs gave baby its bath and put it to bed. Nurse was allowed to go to church every second Sunday, and accordingly every fourth Sunday Mr. Briggs remained at home in charge of baby. After many fruitless murmurings all these little matters arranged themselves, but eventually more serious difficulties arose. The first grave difference occurred in connection with the naming of the child. Mrs. Briggs insisted that the boy should be named Sophia, in honour of one of the first champions of the rights of the female sex. Mr. Briggs was indignant at the very suggestion, and loudly protested that to name a boy Sophia was to mark him out as an object of ridicule for life. He was quite willing, if Mrs. Briggs so desired it, that the child should be named James Stansfeld, or George Anderson, or Jacob Bright,—although for his own part he saw no reason for departing from his own worthy father's good old name of Robert,—but to call a boy Sophia—no, he must draw the line somewhere! Mrs. Briggs, on her part, was equally firm. The custom which appropriated certain Christian names exclusively to one sex was, she insisted, an absurd and barbarous relic of the cruel past. The name of Sophia had been honourably borne by many a good and noble woman, and she saw no reason, either of propriety or of expediency, why such a name should be deemed unsuitable for a boy.

It has been found necessary, in order to the clear appreciation of the unfortunate litigation in which the family were subsequently involved, to explain these preliminary details at some length, and accordingly the further history of the case must be postponed to a subsequent number.

THE ORIGIN AND HISTORY OF THE HIGH COURT OF JUSTICIARY.

To trace the rise of a system of criminal law and judicatories in a country like Scotland is, although an intricate task, at the same time one full of interest. As the inquirer goes back in his search to early Acts and early documents, he finds again and again traces of customs and laws still fainter and fainter, until he is brought up within a measurable distance of the earliest known writings which in this country have survived the ravages of time and the yet more destructive onslaughts of war, with its attendant rapine. We have sought back in this way among the records of our early princes to find traces of what may have been the forms under which attempts were made to administer justice to the rude and semi-independent tribes who then acknowledged in a greater

or less degree the authority of the kings of Scotland; and it is during the time of Alexander I., who reigned 1107–1124, that the first mention of a high officer of justice occurs. It may be true, and probably is so, that in these early days the sovereign exercised in his own person the highest judicial functions, assisted by the same body of persons who formed the legislative council, and aided him in the enactment of the laws. Gradually, however, it became necessary to distinguish between those who made and those who enforced the laws; and it appears that, under Alexander I., that distinction first became observable which subsequently led to an entire severance between the legislative and judicial officers, although their power and authority still flowed from one common source, the royal prerogative. Before the reign of this king, no great officers of State are named in the few charters we possess; but a Chancellor and a Constable, as well as a Justiciar, are found witnessing charters by Alexander. We do not require for our present purpose to trace out this development, except upon the side where it trends towards the formation of a Supreme Court for administering the criminal law of Scotland, and accordingly attention may next be directed to what is left us in the records of the succeeding reign—that of David I., 1124–1153. An examination of the curious “Assise Regis David I.,” or “The Lawys of the Kyng David,” does not throw much light upon the character of the criminal courts in those days, although there is one short Act which may be quoted from the Latin version as follows: “Statuit dominus rex quod nullus justiciarius vicecomes prepositus vel ballivus alicujus baronis sedeat ad judicium faciendum super appellacione et responsione coram eis facta sed cum ad judicium venerit exeant de curia et libere tenentes de curia judicium faciant et revocato justiciario vicecomite vel ballivo seu preposito judicium per eos factum coram eis reddant.” Upon this we may briefly remark that the justiciar by this time had come to be recognised as the principal judge, and he is clearly placed first in rank. The law commences with the simple formula—“Ye kyng hes statut,” and without any reference to a Council of State or other legislative body assisting him by their deliberations. Among the same laws the doctrine of the judgment of a man by his peers is clearly laid down, an earl by an earl, a baron by a baron, and so forth, “bot a les persoun may be jugit be a mar persoun, and nocht a mar be a les persoun.” There were evidently from the foregoing enumeration four ranks of criminal judges at this time, namely, justices or justiciars, vicecomites or sheriffs, prepositi, called aldermen in the Scottish version, and ballivi or bailies, the last being presumably officers of the great nobles. There also will be found distinct traces of a jury system for cases of felony and for minor offences. We read that if it should happen that the king charge any man “of felony or of lyf or of membris he sal clenge (purge)

him anent ye kyng be ye athis (oaths) of xxiiii leil men of that schirefdome quhar it is said that trespas to be maid." The law proceeds to say that if acquitted by these "he sal be quyt," or else suffer due penalty. The same rule was laid down for other offences. These evidences of the growth of a regular system of criminal procedure, with due protection to the accused person, are all the more striking when they occur amongst a collection of early laws which included such barbarous punishments as driving the knife drawn in the King's Court through the hand of the drawer, and cutting off the hand of him who, in similar circumstances, drew blood, "gif he drawys blud ye hand sal be cutt off." A blow with the fist, however, cost the pugilist six cows, as a fine to the king, and a couple to the sufferer from its effects; whilst a curious distinction was drawn between pommelling a man to death and killing him with the sword—"gif he slais hym wyth his neff he sal geyff to ye kyng xxix ky and a colpindach (heifer)," besides satisfying the relatives, while homicide by the sword cost only "xx ky and a colpindach."

No doubt amongst rude, turbulent, and semi-independent chiefs it was difficult to maintain authority without very strong measures, at which these early kings certainly did not stick. Yet a perusal of these laws must impress any one with the remarkable spirit of justice they breathe, and with the desire of the lawgiver, without fear or favour, to do justice between man and man. In concluding our remarks upon this Assise of King David, reference may be made to the term of "ye kyngis justice," which is applied evidently to the justiciar of the district, of whom more will subsequently be heard. This officer was directed, in cases of theft where no cantioner was forthcoming, to seize the accused, and take possession of his whole effects for immediate trial if he had been taken "hand haffand (rubea manu)," or for detention to the next Court if otherwise. In order, no doubt, to provide for regularity in holding these Courts, there is elsewhere an enactment by David, "that ye kyngis mutis of ilk bothyn (that is to say, of ilk schirefdome) sal be haldyn within xl dayis," and that at these Courts are also to attend the bishops and earls of the locality with the sheriffs and landed proprietors, as well as the accused. This last proviso is significant of the state of the country generally at a time when practically all crimes were bailable, and, indeed, when prisons or anything resembling them did not exist, save perhaps in a few burghs or in the dungeons of a baronial castle. In this regulation for the holding of the King's Courts in the various districts may no doubt be found the first origin of a system of circuits, a much older system than many suppose. David, brought up in England by Norman teachers, himself indeed, in right of his wife, an English earl, probably borrowed this idea from the south, and intended by the presence of his own judges in various places to secure at once recognition of his authority and uniformity

of procedure. The sheriff, whose dignity is rendered in early charters by the word "vicecomes," was, it may be presumed, in reality what his title indicated, the deputy of the comes or earl, and his judicial functions would thus be limited, if not entirely controlled, by a power separate from and often hostile to that of the king. Considered in this light the enactment of David has more importance than it otherwise might possess, and we think that the peculiar and transition state of Scotland under this monarch sufficiently justifies the inference we have drawn as to the significance of this law.

Of the same period are the "*Leges et Consuetudines Quatuor Burgorum Berewic Rokisburg Edinburg et Strivelin*," although the collection should rather be described as a compilation and arrangement of existing but older customs than as the work of King David. Amongst them we find one throwing some light upon the two lower classes of judges at least in these burghs whose names will be recognised in the modern spelling of Berwick, Roxburgh, Edinburgh, and Stirling. "At ye fyrst mute nexte eftir ye feste of sancte Mychael ye aldirman and ye bailzeis sal be chosyn thruch ye consaile of ye gud men of ye toune ye quhilk aw to lele and of gud fame. And thai sal suer fewte til ye lorde ye kyng and to ye burges of ye toune. And thai sal suer to kepe ye customys of ye toune and sal nocht halde lauch on ony man or woman for wroth na for haterent na for drede or for lufe of ony man bot thruch ordinans consaile and dome of gude men of ye toune. Alsua thai sal suer that nother for radnes na for lufe na for haterent na for cosynage na for tynsale of thair silver" (*nec timore nec amore nec odio alicujus nec consanguinitate nec pro amissione pecunie*) "thai sal nocht spare to do rycht till all men." These and other laws give abundant evidence of a system of order and independent jurisdiction recognised among the four burghs enumerated, a system which probably if it did not arise, at least took permanent form under David I. From the time of that monarch the privileges of the burghs as tenants *in capite* of the Crown were duly recognised, with a result beneficial both to the burgesses and to the national exchequer. The four burghs mentioned in the Latin title are, it will be remarked, all of them within what may be termed the province of Lothian, a district which in those days extended from the Forth to the Border. When it is remembered that King David was Earl of Lothian and Cumbria during the whole reign of Alexander I., his brother, 1107-1124, and that he exercised in this capacity royal power, it is not surprising that we find all the burghs named within the southern portion of the kingdom. In the evidence which may be gathered from a close scrutiny of the names of witnesses to charters granted by this prince, both as earl and subsequently as king, will be found proof sufficiently distinct that he greatly favoured the Norman element now gaining a firm footing among

the landowners of Scotland, and with these barons of Normandy and their feudalism there were introduced many customs and laws modifying and changing the older laws which had prevailed alike in northern England and in the Saxon districts to the north of the Tweed. No doubt it was owing to these circumstances that, after David succeeded his brother on the throne of the united northern kingdom, a marked advance in the system of the whole body politic of Scotland may be observed, and the Courts of Criminal Procedure, as we shall see, shared fully in the benefit. Reference may incidentally be made to a charter, which still exists, granted by King David at Scone, in the presence of Gregory, Bishop of Dunkeld, and of Edward, High Constable of Scotland, as showing that, in furtherance of the efforts to maintain order and justice in his kingdom, this sovereign granted special jurisdiction and judicial powers. The charter in question confers such rights upon the Abbacy of Dunfermline. "*Prohibeo quod homines abbatibus de Dunfermelyn de Nithbren alicui non respondeant de placitis et calumpniis unde calumpniati fuerint nisi in curia sancti Trinitatis et Abbatibus de Dunfermelyn. Et precipio quod iudex meus illius provincie (Fife) in cum hominibus qui illuc placitari venerint intersit ut placita et iusticie juste tractentur.*" These grants of authority in turbulent times, although perhaps due to the fear, superstition, or religious zeal of the king, were in the interest of order, and no doubt helped to this end, however much they subsequently came to be abused by unscrupulous possessors of the privileges.

Of the four burghs named in the "*Leges*," Berwick, Roxburgh, now reduced to a mere village, and Edinburgh, are all well within Laudonia (Lothian), as it was then understood, and Stirling is also on the confines of that district or province. Scotland proper in the days of David's brothers and father was distinctly known as the country between the Forth and the Spey, bounded on the east by the sea, and upon the west separated by the mountainous range of Drumalban from Argyll, itself a distinct territory. These districts in David's time and that of his immediate successors represented still the various provinces which even after the death of Malcolm Canmore, his father, in 1093, had remained almost independent and separate from the kingdom. Besides Lothian, Scotland proper, and Argyll, in the south there were Cumbria and Galloway, including the shires of Kirkcudbright and Wigtown, with some portion of Ayr, and possibly also of Dumfries, Galloway being so far distinct that it is recorded to have furnished a division in David's army at the Battle of the Standard, described as consisting of Picts "*qui vulgo Galleweianses dicuntur.*" Again, in the north was the Earldom of Moray, with Ergadia Borealis or northern Argyll running up to the borders of Sutherland on the west, whilst the two counties of Sutherland and Caithness, together with the eastern seaboard as far south as the Moray Firth, still

were under the power of the Norsemen, whose sovereignty was acknowledged in the Earldom of Orkney and the Western Isles. We have dwelt somewhat upon these district-divisions of Scotland because in the laws of William the Lyon, to which reference must be made, there occur frequent allusions to these provinces in connection with the justiciars and the holding of their Courts.

William reigned 1165–1214, succeeding Malcolm IV., among the scanty records of whose reign (1153–1165) we have not found anything bearing upon the administration of criminal law. The first of the laws in the “Assise Willelmi Regis” commences, “This is ye assise of Louthiane maid be ye king;” and concludes, “This assise was maid at Roxburgh at ye Justis mute (ad placita Justiciarii) in ye fest of sanct Symon and Jude, with common consent of all ye baronis beand thar to gidder gadderit.” We thus learn that there continued to be a distinction, under William, between “Laudonia” and “Scotia,” such as had existed when David was earl of the former, and as yet not king of Scotland. Roxburgh at this time, from numerous allusions, seems to have been a place of great importance. In the third and fourth laws of the same collection, which seem probably to have been promulgated at Perth, there occur references to the laws of the preceding monarch as to the disposal of cases relating to “catal stollyn;” indeed this offence, at that time a pursuit so favourite and so universal, was hardly regarded as criminal. The law called “Claremathane,” however, in dealing with this incidentally throws a good deal of light upon the administration of justice at the time, by giving us the places which were to be centres for the Courts. Thus, for the district “betuen Spey and Forth,” or as the Latin version has it, “inter Spey et Forth vel inter Drumalban et Forth,” a resident accused of cattle-stealing had fifteen days to answer to the charge, at the place named by King David; no doubt one of the “steddis of warrantie” enumerated thus: “In Gowry at Scone In ye Starmunth at Cluny In Athol at Raite In Fyffe at Dalgynche In Strather at Kyntouloch In Angus at Forfar In ye Mernys at Dunnotter In Marre and Buchan at Abirden. In Ros and Murray at Inverness.” The greater number of these places are within the Scotland proper of Alexander I. and David his brother, but the exercise of criminal jurisdiction had been extended by King William, and the reference to Inverness was little more than boasting assumption, or else it points to a period subsequent either to the subjection of the territory between the Dornoch and Moray Firths, by a large military expedition in 1179, or the final overthrow of the rebellious Donald Ban (Macwilliam) in 1187. The tie which bound Caithness and northern Argyll (the western part of Inverness and Ross) to the Crown of Scotland was very slender, and this is well illustrated in its bearing upon the administration of justice by the following law: “Gif he that is challangyt war-assit to get his warrand that wounys in Moray or in Ross or in

Catenes or in Ergyl that pertenis to Moray and may nocht get him than sal he cum to ye schiref of Inuerness." Inverness was made the centre of a large district over much of which the king's judges could have little power, whilst in the more settled parts of the kingdom many places are named, and the areas of jurisdiction are small. Yet worse seems to have been the state of matters in Argyll, "quhilk pertenis to Scotlande," where for want presumably of a proper place within the district, the Earl of Athol or the Abbot of Glendochir are named, so also for Cowal and Cantyre, the Earl of Menteith; and Galloway, remote as it might be, was provided for at the Bridge of Stirling: "Sall ansuer ye challangeouris of Scotlande at the end of vj workis daye at ye brig of Striveling."

When we turn to the few extant charters of this early date we find among the witnesses not unfrequently persons described as "Justiciarius" and "Justiciarius Scocie," showing that this post had already become one of dignity, because it is only the highest officials of the kingdom whose names so appear. For example, the holder of the justiciar's office, for a considerable time in King William's reign, was the Earl of Fife. Even in David's time "Constantinus Comes de Fyf magnus judex in Scotia" is mentioned as one of three men "legales et idoneos" who are selected to decide in a dispute as to certain boundaries, and it is possible that the office thus described may have been the same as that held by his representative in the subsequent reigns. During the short life of Malcolm IV., in an Act of 1154, Duncan (Comes) is mentioned as assenting; while in the same reign, in 1158, a charter in favour of Walter filius Alani dapiferi is witnessed by Earl Duncan (Dunecanus Comes). The same name is repeatedly found as a witness to King William's charters as "Justiciarius Scocie" and "Comes de Fife." He thus appears in a charter granted by the king at Elgin in favour of the burgh of Inverness, where amongst the witnesses also are Earl David, the king's brother, Gilbert, Earl of Strathern, Hugh, Chancellor of Scotland, William Cumyn, and others. So again in company with the Bishop of Caithness, the Earls of Angus and Strathern, and the Constable and Chamberlain of Scotland, Earl Duncan (Comes Dunecanus, Justiciarius) is found at Perth on the occasion of the granting of a charter by the king: "Burgensibus meis de Aberdoen et omnibus burgensibus de Moravia et omnibus burgensibus meis ex aquilonali parte de Munth manentibus." In other charters granted in favour of the burgesses of Inverness "apud Eren," "apud Strivelin" in favour of Philip de Vallon, and "apud Clonin" (Cluny) in favour of William de Haia Herol (de Errol), this same Duncan appears, and we may not unreasonably conclude that he was the High Justiciar of the kingdom at the time. He seems to have been succeeded by another great baron, William Cumin, who, as justiciar, witnesses at Kintore another Inverness charter.

We are led to this conclusion by the fact that Cumín's name is found along with that of Duncan in previous charters, but in none that we have seen where Duncan is a witness is Cumín described as "Justiciar," whilst the reverse is found several times. Before William's death, in 1214, there must have been at any rate two justiciars, because we have a charter at Selkirk addressed "*Omni-bus probis Hominibus in Galweia*" in favour of certain brethren from the Priory of Melrose "*in Galweio manentes*," probably in order to found a new religious fraternity; and this is witnessed "*Rollando filio Vctredi justiciarius, Willelmo de Lyndesay justiciarius*," of whom the latter also appears in the Stirling charter already mentioned.

We have now brought down this historical sketch to the death of William the Lion in 1214, and have endeavoured to trace in the somewhat scanty records of the century preceding that event any references that seemed to have a bearing upon the rise of our system of criminal law and its administration. At this stage, therefore, before we proceed to follow up the subject from the records and history of the reigns of Alexander II. and Alexander III. which closed the ancient dynasty of Celtic kings, it will be convenient briefly to review the changes and developments in matters criminal which had placed the administration of justice where it stood about the time of William's death, and in doing so we propose to offer a few remarks on the deductions fairly to be drawn from the facts in our possession.

It must be remembered that the earliest written documents in Scotland which have descended to us at the present day cannot probably claim an antiquity so remote as the Norman Conquest, and indeed there may be good reasons for expressing doubts whether the authenticity of any writing earlier than the reign of King Eadgar (1093-1107) has been satisfactorily and fully established. Even were this otherwise, the chain of written evidence must certainly break at no great distance from that period, and failing direct sources of information we can only gather from analogy and from a study of the social and tribal system some faint idea of what may then have been the rude outline of a system for administering justice between man and man. Among barbarous and semi-barbarous races the importance of crime and punishment bulk largely, and this is especially so when the first benefits of a higher civilisation are experienced, and the necessity is felt for peace and order, for security to life and property. In Scotland these early centuries present the spectacle of a constant struggle between various races and tribes, each endeavouring to get such a preponderating influence as to be able to consolidate all in one kingdom; and even when that was done in name, there yet remained the fact that allegiance was often little else than a mockery. We may, however, not unreasonably seek in the changes which led from tribes to provinces, from provinces to

a kingdom, to follow the privilege of administering justice, the prerogative of life and death, as it passed through the hands of various holders, and finally became the king's alone. As in Ireland, there existed here under a purely Celtic system the tuath or tribe with its portion of common tribal land. The chief originally seems to have had the style of Ri or King, and evidently enjoyed full power over his tribesmen, though, at least in Ireland, an Ardri or Supreme King was recognised as over the others. In those parts of Scotland where the Celtic system was suffered to prevail and develop, the tribes became provinces and the Ri disappeared, to be replaced by the Mormaer (Great Steward), although in the province of Moray as the death of Maelsnectai, "Ri Moreb," is recorded in 1080, the title must there have continued later, while the Irish annals bestow it upon two Lords of Galloway whose deaths occurred so late as 1199 and 1234. Except Argyll, a remarkable exception to which we may afterwards have to allude, all the provinces of Scotland proper, that is, between the Spey and Forth, were ruled by Mormaers owning nominally the king's authority from the middle of the twelfth century, if not sooner, and without entering further into details we may conclude that at first these chieftains were each of them justiciars in their own districts. The old tribal lands had become the domains of these powerful nobles, and the judicial rights were retained. The progress of events and the marriage of Malcolm Canmore to a Saxon princess introduced many changes, and the Mormaers insensibly become earls (Comites), while the duties of the lower official in the tribe, the Toisech, are, as we think, divided between the thane, holding Crown demesne, and the sheriff (Vicecomes), holding from the earl by deputy the right to exercise local jurisdiction within the bounds.

There can be no doubt that the policy of all the Scottish kings throughout was to curb the power and assumption of these earls, of whom we are told there were at first only seven; but probably it was found that in no way could this be done more effectually than by causing the king's authority, as delegated to his justiciars, to be recognised as supreme throughout the various provinces. This view certainly explains the grant of jurisdiction to certain abbeys and towns, thus placing them, as it were, under the more direct control of the king as claiming through him all their privileges. We thus also can understand how a great earl was so often justiciar; and the fact that the earl of the province of Fife was so often selected is probably due to his position in a central part of the kingdom, with which, moreover, the reigning family were specially connected.

The distrust existing between Scotia proper and Laudonia (Lothian), so recently joined to it, would naturally lead to a separate appointment for each, and it has been seen that this division actually existed before William's death. Sutherland and Caithness, with the islands, belonged not to Scotland. Argyll was so independent as to

be without even an earl who recognised the king; for Galloway special legislation was needed, and probably the royal justiciars dared not enter it to enforce the law; so that, after all, two high officers, one north and one south of the Forth, were sufficient to exercise all the judicial authority in the repression of crime that King William was able or venturesome enough to attempt.

(*To be continued.*)

NOTES IN THE INNER HOUSE.

UNDER the head of *Process* we note the following: In *Grant*, petitioner (May 20, 1884, Second Division), the objection was taken to an application for admission to the poor's roll that it did not state the nature of the proposed action. The Court ordered an amendment to be made introducing the required statement. Where an applicant for the poor's roll admitted that he was earning thirty-five shillings a week, but alleged that all his wages above £1 had been arrested by his own and his opponent's agent for expenses incurred in the Court below, the Second Division remitted the case to the reporters, with instructions to inquire and report their opinion as to whether the case of poverty had been substantiated (*Macfarlane*, Second Division, May 30, 1884).

Mages v. Dalglish, Falconer, & Co. (May 28, 1884, First Division) was an action of damages for injuries laid both at common law and under the Employers' Liability Act. In the issue the damages claimed were stated thus: "Damages laid at common law at £1000, or under the Employers' Liability Act at £70, 6s." The Lord President said, "I think also that we should allow the schedule to stand as it is, so as to enable the jury in assessing the damages to have clearly before their minds the alternative grounds quoted upon which this action is laid."

In *Paterson v. Wilson* (May 30, 1884, Second Division) the Court refused to allow creditors who had not appeared in a process of cessio before the Sheriff to appeal against his decision dismissing the action. This case raised the question whether in cessios there is an appeal to the Sheriff from an order of the Sheriff-Substitute adjourning the diet in respect of failure to lodge a state of affairs. The Lord Justice-Clerk seems to have thought the appeal competent, whereas Lords Craighill and Rutherford Clark doubted the competency.

In *Anderson and Others v. Muirhead* (June 4, 1884, First Division) certain minor children, the pursuers, along with a *curator ad litem*, in an action of damages, had accepted a tender made to them by the defender. They moved the Court to appoint their grandfather to administer the money for their behoof, but it was held that a *curator bonis* must be appointed in ordinary form.

In *Brown v. Cartwright and Others* (May 21, 1884, Second Division) a curious question was raised. "The late Sir William Stirling Maxwell left legacies to certain servants, and "to each of my other servants who shall be in my service at the time of my death, and who shall have been with me for four years—one year's wages." Opposite this provision, on the margin, was written by the testator in pencil the words, "say £1000," evidently an estimate of the amount to which these payments would come. A blacksmith who had been employed upon weekly wages sued the trustees, who resisted his claim in respect that he was not a domestic servant of the deceased. The Lord Ordinary took their view of the matter, holding that although Sir William did not use the word "domestic" "he meant it." He went mainly upon the fact that while Sir William had estimated the amount at £1000, a much larger sum would have been necessary if persons in the position of the pursuer were to be included. The Inner House reversed, and decerned in favour of the pursuer. Lord Young and Lord Craighill held that this marginal note could not affect the deed, and the former, moreover, was not disposed to read it as the Lord Ordinary had done. He held that the expression "other servants" would "have extended to a secretary, certainly to a librarian, to a piper—if the piper would condescend to be anything but master; in short, to any one who had been employed in his establishment and in his service for four years before his death." This decision seems rather opposed to certain decisions in the English books founded upon by the defenders, in which such legacies have been limited to servants in the family hired by the year. The Lord Justice-Clerk was inclined to include every one "belonging to the domestic establishment." He said "the expression 'one year's wages' points out the amount but not the quality of the persons who are to receive legacies; all persons paid by wages are, as I think, to receive the amount of wages they would have earned in a year, whether they were engaged by the year or not."

In *Stewart*, petitioner (June 25, 1884, First Division), the Court sustained the validity of a deed in spite of certain erasures and deletions which had been made manifestly subsequent to the date of subscription. The statement in the testing clause being false, these flaws were treated as if the testing clause had been silent concerning them. But as they were not considered to be *inter essentialia*, it was held that their existence did not invalidate the deed. "If," said the Lord President, "they (*i.e.* the words written on an erasure) had been necessary to complete the description of the subjects,—that is to say, if without these words the description would have been insufficient,—then I think the objection would be very fatal."

We note two decisions relating to cheques. In *Robb v. Robb's Trustees* (June 4, 1884, Second Division) there had been an account-current kept for a number of years between law agents

and a client. It contained six entries of "To pay you," or "paid to you in loan." In an accounting the agents founded—as vouchers for five of these alleged advances—on cheques granted by them in their client's favour, and endorsed by him. The client was dead, and his widow objected to the cheques being received as evidence of loan. But the Court held that the evidence thus afforded was in the circumstances complete, distinguishing this case from that of *Haldane v. Spiers*. Lord Young said, "I only wish to add a word about the case of *Haldane v. Spiers*. I think that case determines conclusively that a loan of money is not proved by a cheque and the endorsement of the alleged borrower on the back of it, which is just an acknowledgment that he has received the contents. It proves nothing but the receipt of money. . . . But when you come to an account-current between factor and principal, or between agent and client, with receipts and disbursements *hinc inde*, what you have got to do is to establish the receipt of money and the payment of money—the very thing which a cheque is most fitted to do."

The other case—that of *Milne v. Grant's Executors* (June 5, 1884, Second Division)—was very peculiar. Mr. Grant, a gentleman who resided in Elgin, handed to his housekeeper a cheque upon the North of Scotland Banking Company, written in these terms: "Pay to me or bearer one hundred pounds when I am dead, sterling, on account of John Grant." This cheque was kept by her, and was in her possession at the time of Mr. Grant's death. She demanded payment from his trustees upon the ground that the delivery of the cheque to her was effectual as a donation of the sum mentioned in it. The trustees produced a settlement of later date than the cheque, by which all Mr. Grant's property was conveyed, and which contained no mention of the pursuer. The Sheriff-Substitute at Elgin, without proof decided in favour of the pursuer, holding that the "fact of the terms in which the document is expressed, and that the pursuer is in possession of it, shows presumably, in a way which is not met by any adequate counter-explanation on the part of the defenders, that the cheque or order was a gift, and that the pursuer is the person for whom it was intended," and that "it cannot be said that the effect of the bill or order fell as a mandate by the death of Mr. Grant, because by the express terms of it it was only to be fulfilled after his death." The Sheriff-Principal ordered a proof, and evidence was led which went to show that the deceased had intended to give the pursuer something. The Sheriff-Substitute again decided the case in the pursuer's favour. A second appeal was taken to the Sheriff, who assoilzied the defenders upon the ground that the document viewed as a bill was insufficiently stamped. The case then went to the Court of Session. It was thought in that Court unnecessary with the question raised by the Sheriff-Principal, the judges that the document did not constitute a donation. "The

mere delivery of it," said the Lord Justice-Clerk, "carried nothing, and I am inclined to think that the adjection of these words 'after my death' rendered the whole transaction nugatory and null." Lord Young held it was neither a gift *inter vivos* nor a *donatio mortis causa*. He quite agreed "that a gift of any amount of money, or of any article of property, may be completely made and well established by parole evidence. But it must be made * * * But what was the thing given here? an order to pay something to himself or to the bearer, after he was dead—a sum of money. Did he thereby dispossess himself of anything? Not one farthing. His whole property was his own to give away to anybody he pleased other than her—to squander it if he liked. Therefore there was no completed gift." Lord Craighill pointed out that it was not a donation because no money was delivered; nor a *donatio mortis causa*, because Mr. Grant was in good health at the time; nor an effectual legacy, because of the nature of the document itself.

The decision in *Nixon v. Deas* (June 17, 1884, First Division) carries the doctrine of constructive residence in settlement cases farther than has yet been done. It was an action at the instance of the inspector for Greenock against his brother of Port-Glasgow, for relief outlay made by the pursuer on a widow and children who became chargeable in October 1882. The father and his family had resided in Port-Glasgow from 1870 to 1876, when the former went to Australia, where he remained until his death in 1882. From time to time he wrote letters to his wife and sent money to her. It was admitted that had he succeeded in colonial life he would have sent for his wife and family to join him. In September 1879 the pauper's wife and children came to reside in Greenock. The Sheriff-Substitute at Greenock, who first tried the case, found that Beattie had lost by non-residence his settlement in Port-Glasgow, but the Sheriff-Principal reversed, taking quite the opposite view, and finding the inspector of Port-Glasgow liable in repayments. Of course the sole question was whether the deceased while actually resident in Australia remained constructively in Port-Glasgow. In the Court of Session the judges agreed with the Sheriff-Principal, and held themselves bound by previous decisions to find that there had been a constructive residence. The peculiarity here was that the constructive residence had extended for the full period. "There is no doubt," said Lord Adam, "that the present case goes farther than any of the previous decisions upon the subject, and certainly leads to somewhat startling results. The present case was foreseen and commented upon by the Lord President in the case of *Beattie v. Stark*." This latter judge said "that an Irish emigrant in Australia who has been earning a livelihood there for six years, and has nevertheless been all the time residing constructively in the parish of Port-Glasgow in Scotland, is a hard saying, but it is

the logical sequence of previous judgments of the Court. Therefore I found my opinion upon the authority of the previous judgments which have determined that proposition, and am on that account for affirming the decision of the Sheriff."

In *O'Kell v. Cochrane & Co.* (June 11, 1884, First Division) the Court of Session has set an example which the High Court of Justice in England might do well to follow. A bankruptcy petition had been filed in England; one of the trustees was a Scotsman, who brought certain funds belonging to firms in which the bankrupt was interested from America and lodged them in a bank in Scotland. A Scottish creditor of these firms raised an action for the distribution of these funds. But the Court sustained the plea of *forum non conveniens*. The Lord President said: "It would be against all rule to entertain this case, though I do not say there is no jurisdiction." He held that the trustee was under the orders of the English County Court as to the disposal of these funds, and that all questions concerning them must be determined in England. Had this principle been recognised in the *Orr-Ewing* case, much trouble and no little expense would have been saved.

UNREASONABLE CONTRACTS.

JUSTICES of the peace have often to deal with reasonable conduct and reasonable excuses for doing what may seem at first sight an offence, and they require to make up their minds by acting on some standards of their own. This of itself implies a wide experience of life, for nothing but experience and variety of observation can be trusted for a sound conclusion. The great circle of critics who are always ready to detect a failure in divining the true medium and golden rule, adds to the difficulty on these occasions. Though justices have seldom to consider such a subject as what is a reasonable contract, except, perhaps, in the case of employers and apprentices, they may usefully consider the progress of the recent litigation in the courts of law as to what is a reasonable contract, and the views which the various judges have taken of it from first to last. A case has lately reached the highest court and been disposed of finally, and as we have been favoured with reports of the reasons of the Courts at considerable length, we are all in a condition to reflect upon and profit by this result of the highest wisdom.

As a general rule, it is safe to start with the elementary notion that Courts have always set themselves against trying to relieve people from what are called foolish contracts. So long as men are beyond the stage of infancy, which ends at 21, and no fraud is used, they are entirely at liberty to overreach each other as much as they like, and the Courts will see that on a breach of the con-

tract by either party, the other will obtain suitable damages, and the right of enforcing payment as far as Courts can enforce it. It is true that there are several qualifications when there is a certain relationship between the parties, such as that implied in trustees, or parents, or solicitors, or agents, or spendthrift heirs, which somewhat reverse the ordinary rule, and give rise to a presumption that some advantage had been taken of one by the other; and hence the contract may be set aside without any proof of fraud. But as to the great majority of contracts, the cardinal rule is that each party must look after himself. If he makes a foolish bargain he must abide by it; and if he makes a wise bargain he will be entitled to all the profit. The Court will not attempt to judge between the parties, but will only see that whoever breaks the contract shall give satisfaction to the other party, if such is demanded.

The Railway and Canal Traffic Act introduced a new doctrine in this department of business. The old notion of travelling was greatly upset by the practice of railways, for whereas formerly any one could hire his own waggon or coach and go at any pace he pleased, and make any terms he thought fit, the railway epoch established a new state of things. Waggons and coaches were driven off the roads, and everybody wanted thereafter to travel by the railway; and the railway being in the hands of one company, a monopoly was thus created, and thereafter the company could, within certain limits, dictate its own terms. This constituted, practically, so oppressive a monopoly, that the Legislature, after some years' experience, devised the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, which gave the Courts of law the power of deciding whether the particular contract was reasonable before it would enforce it. That Act declared that even in special contracts with customers, the conditions imposed should not be binding, unless they were reasonable, and it was for Courts and judges to say whether they were reasonable or not. This gave a larger power to Courts, and sometimes it involved a most difficult and delicate task, seeing that judges, who are neither carriers nor customers of carriers, may have had little experience of that kind of business to guide them aright.

For many years there was considerable uncertainty as to the way in which this new doctrine was brought to bear on the business of railway companies. But in the case of *Peck v. North Staffordshire Railway Company*, 10 H. L. C. 473, a leading authority was established after a review of all the antecedent decisions, and after much consideration that case passed through the Exchequer Chamber, and reached the House of Lords, where the judges were called on to give their help. By that case it was established that there may be contracts entered into in writing between railway companies and men of business, which might be viewed as legal at common law, and yet which the Courts may

treat as so unreasonable that they could not be enforced. The test of what was reasonable was thus not what the two parties chiefly concerned might be satisfied with, but what should seem to a judge to be reasonable. It was thus no longer sufficient for Courts to say that whatever men of business think reasonable will be accepted as reasonable by the Court, but the latter was to judge for itself on an independent footing, and from its own notion of what is fitting. Hence in a great variety of subsequent cases an attempt was made to lay down some subsidiary rules as to what was reasonable and what was not. One of these rules soon came to be this, that if the company made two scales of charges and thus gave an option to the customer so that the latter might be free to choose, the Court would then try and accept that without embarrassing itself with considerations of reasonableness or unreasonableness.

One or two illustrations of this result may be briefly noticed in passing. In *Glenister v. Great Western Railway Company*, 29 L. T. N. S. 423, the plaintiff was a chair manufacturer at High Wycombe, in Buckinghamshire, and he paid a reduced rate for sending his chairs on condition of signing a consignment note undertaking to relieve the company from all claims for damages arising from delay or negligence of the company, except such negligence was wilful on the part of the company's servants. On one occasion the chairs were damaged by a railway accident which was caused by the company's servants letting out some cattle at one of the stations. The contest was whether the negligence was wilful. The Court held that there was no evidence of that kind of wilful negligence for which alone the company admitted liability. So in that case the company escaped the liability.

In another case of *Lewis v. Great Western Railway Company*, 3 Q. B. D. 195, a cheese factor at Market Drayton sent a parcel of cheeses, signing a consignment note containing the words "owner's risk;" and it also appeared that the company had two scales of rates, one being a reduced rate in consideration of the company being relieved from liability for loss unless caused by the wilful act or misconduct of the company's servants. It was alleged that many of the cheeses had been damaged in the transit by negligent and unskilful packing, but the evidence did not go the length of establishing that there was wilful misconduct. The judge accordingly ruled that the contract was reasonable, and that the company was not liable. The Court of Appeal had then to consider whether this was a correct ruling, and a right application of the statute. The Court agreed with the judges, the judges being Bramwell, Brett, and Cotton, L.JJ. But in that case Brett, L.J., threw out a view which he afterwards acted upon in another case, which was this, that if there had been no practical alternative, then the conditions would have been unreasonable, and the contract would have been void.

This last view came to be very important in the latest and now the leading case of *Manchester, Sheffield, and Lincoln Railway Company v. Brown*, J. P. p. 388. In this case the plaintiff Brown was a fish merchant at Great Grimsby, who used to send his fish to London for the Billingsgate Market. He used to collect his fish in the afternoon, and despatch it from Grimsby at 8.30 p.m., by a train which reached next morning's London market in good time. The railway company made out two sets of charges or alternative rates. One was the charge for carrying the fish at the ordinary risk of a carrier, and the other was a charge about 20 per cent. lower at the owner's risk. The company announced this as follows: "To parties willing to free and relieve this company and the other railway companies over whose lines fish may be forwarded from any of our stations, from all liability for loss or damage by delay in transit, or from whatever other cause arising, the company agree that the rates charged will be one-fifth lower than where no such undertaking as the annexed is granted." The plaintiff wrote in answer: "I request that you will forward all fish delivered by me, or on my account, from any of your stations at the lower rate, and I undertake and agree to free and relieve the railway companies from all claims or liability for loss or damage." One day, shortly before Good Friday, a large quantity of fish was despatched, and owing to the crowded state of the trains, delay occurred, so that the fish, instead of being despatched at 8.30 p.m., did not leave Grimsby till next day at 3 p.m., and missed the London morning market. The plaintiff sued the company for the loss he thereby suffered. The cause of the delay was entirely due to the great quantity of the traffic, so that there was no dispute as to the negligence being wilful.

The two judges who first gave an opinion on the case held that the company were protected against liability by reason of the alternative charges, and the choice made of the lower charge. The Court of Appeal, however, reversed that judgment. Brett, L.J., followed up the view he threw out in the former case, and with confidence insisted that in this case it was not only an unreasonable condition to carry without incurring any liability, but that in this case there was no real alternative. There was only a mere show of it. He said that the plaintiff could not send his goods by the dear train, because he would be undersold by his neighbours choosing the cheap train. He also added that no condition can be reasonable which lessened the liability of the company to something lower than that of a gratuitous bailee. So judgment was given for the plaintiff.

The House of Lords, consisting of Lords Blackburn, Watson, Bramwell, and Fitzgerald, reversed this last judgment without much ceremony, and thereby overthrew much of the ingenious argumentation of the Court of Appeal. The Lords construed the contract to mean that the lower rate was offered in order to protect

the company from liability for the negligence of their own servants, and this was a legitimate and reasonable thing to do. And as there were two sets of rates, ample freedom of contract was secured to the customer. Lord Blackburn said that the Railway Traffic Act meant only to protect customers against the monopoly, and so long as the company offers to carry, either on the ordinary liability of carriers, or at a lower rate when part of that liability is waived, this is all that is required. He also added, however, that the mere fact of there being two alternative rates was not conclusive in favour of the company, unless it appeared that both sets of rates were reasonable in themselves. And he said that if all the customers chose the cheaper rate, this tended to show that the other rate was not reasonable, and that it was a deterrent and merely illusory rate. But in this case both rates were used by customers.

Lord Bramwell was especially jubilant in this case, treating it as an example of that liberty of contract of which he professes to be the champion. He could not understand how men arrived at maturity should not please themselves as to which of the two alternatives they would accept, and he even went the length of holding that whatever two men of business choose to agree to must be always reasonable. This, of course, would sweep away the Railway Traffic Act altogether, and seems too valiant a proposition for general acceptance.

This leading case is a valuable example of the ease with which one set of judges can demolish the arguments and reasons of another set of judges, whenever the end seems to justify the means.—*Justice of the Peace.*

Correspondence.

(To the Editor of the Journal of Jurisprudence.)

THE ORR-EWING CASE.

SIR,—In view of the possibility that this case may come, as a Scotch Appeal, before the House of Lords, and that the House may feel itself hampered by the decision which it has already pronounced in the English Appeal, it may be interesting to recall the *dicta* of two very eminent English judges as to the duty of the House of Lords in such a conjuncture. In the case of *Warrender v. Warrender*, 1835, 2 Clark & Fennelly 488, the question was whether the Court in Scotland had power to dissolve a marriage solemnized in England between a domiciled Scotsman and an Englishwoman, on the ground of the wife's adultery committed abroad, while the parties were living apart under a deed of separation. The Court of Session had decided in the

affirmative. Lords Brougham and Lyndhurst, sitting in the House of Lords, were much pressed by the case of *Lolley*, decided by the twelve judges of England in 1813 (Russell & Ryan's C. C. 237).

The decision there was that an English marriage between parties domiciled in England could not be dissolved in Scotland on the ground of adultery. After stating certain points of difference between the laws of the two countries, Lord Lyndhurst went on to say, "Other various and striking points of anomaly, alluded to by my noble and learned friend, are also obvious in the existing state of the laws of both countries; but however individually grievous they may be, or however apparently clashing in their principles, it is our duty as a Court of Appeal to decide each case that comes before us according to the law of the particular country whence it originated, and according to which it claims our consideration, leaving it to the wisdom of Parliament to adjust the anomaly, or get rid of the discrepancy, by improved legislation." Lord Brougham also said: "I think that this judgment does not break in on *Lolley's* case. This is a decision in reference to the law of Scotland: a judgment founded on which we now, as a Court of Appeal, confirm. *Lolley's* case refers to the law of England. Whatever opinion I may have entertained of *Lolley's* case in the Court of Chancery, or privately, cannot affect my judicial opinion in this House, sitting as a member of a Court of Appeal on a case from Scotland."

With these opinions before them, we need have little fear that the House of Lords will maintain the decision of the Court of Session,—leaving it to the Legislature to settle the conflict for the future by passing Mr. Cochran-Patrick's excellent Bill.—I am, etc.,

T. C. YOUNG, JUN.

GLASGOW, July 1884.

Reviews.

Lectures on the Philosophy of Law, designed mainly as an Introduction to the Study of International Law. By WILLIAM GALBRAITH MILLER, M.A., LL.B., Lecturer on Public Law (including Jurisprudence and International Law) in the University of Glasgow. London: Charles Griffin & Company. 1884.

MR. MILLER tells us in his preface that his present volume upon the philosophy of law was written as introduction to his general course of lectures on International Law, not only in deference to academic traditions, but also in answer to the contention "of the orthodox English school of Jurisprudence, that International Law "

is "not law." Accordingly, he assigns to himself the task of examining "the nature of law in general," or as he elsewhere says, of solving the problem "what is the idea of right?" It is admitted on all hands that in all jural relations there is ever present, together with infinite variety, a constant element; and it is to the explication of this element that Mr. Miller's inquiry is directed. Now we cannot disguise from ourselves that the title of this work is misleading. "Philosophy of Law" has a meaning only if we either take something from philosophy or put something into law. "Philosophy of Law" must either be equivalent in meaning to jurisprudence, in which case injustice is done to philosophy; or, it must be equivalent in meaning to a united science of ethical, political, social, and jural relations, in which case law comes to mean so much that it ceases to have any definite meaning.¹ We shall see immediately what meaning our author attaches to the phrase.

After criticizing various theories of jurisprudence, and pointing out their inadequacy on various grounds, Mr. Miller asks, "What is the nature of the addition made to facts, in order to constitute a legal relation?" and answers: "The 'idea of right' is a convenient expression for the *à priori* element abstracted from any legal relation; but it must be observed that it cannot exist apart from the facts, and the facts are meaningless without it." He then proceeds to indicate the germs in which the idea of right has been embodied. Now we venture to think that had Mr. Miller found it convenient to follow the example set by some of his authorities,—*e.g.* Trendelenburg,—had he prefaced his general inquiry with a statement of his conception of society in the widest sense, he would have made his position much clearer and easier of comprehension to the ordinary reader. In dealing with a work entitled "Philosophy of Law," unless we know our author's view of the relations in which the spheres of law, morality, and religion stand to each other, we cannot tell what he includes in, and what he excludes from, each sphere respectively. "The idea of right" is the central thought in Mr. Miller's system; of this idea all "the phenomena which we designated positive laws, in their development, as well as at every stage of that development, however diverse they may appear, are simply realizations;" and yet it is not until late in his argument that he makes plain what this "idea of right" really means. He thus shows us the form in which right is expressed (positive law²) before he shows us what right is.

What then is "the idea of right" in Mr. Miller's view? It is

¹ Hegel, an authority on whom Mr. Miller especially relies, and with whose conclusions he seems generally in agreement, puts upon his title-page, "Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft;" and in his "Phänomenologie" he treats "Rechtszustand" as a subdivision of "Sittlichkeit."

² Not in the sense in which Professor Lorimer uses the term.

the idea of the organic unity of the individual and the world within which he dwells. In other words, every human being is not only an individual, but he is also a member of society, be that society a family, or a tribe, or a nation. Each man is included in one or more spheres of human life. There is no human being who is wholly isolated; there is no society which is wholly destitute of members. In short, either side of the relation, taken by itself, is a meaningless abstraction, while the relation itself is a relation of organic unity. But to call this idea of organic unity the idea of right is merely misleading. It may be the idea of society or of humanity. It may be true that there is a higher unity in which law, morality, and religion are included; but were it true, it in no way follows—as Mr. Miller contends that it does follow—that they are, or ever will be, in any sense identical.

Moreover, this conception of the idea of right informs his conception of the nature of "rights." In all jural relations—"in each of the notions of person, property, and contract, the family and the State—we may distinguish four elements—(1) a physical fact; (2) a conscious claim by the individual concerned, either for himself or as a member of an organic group; (3) an organic State or other groups of persons physically existing; and (4) a recognition by the State or group of that fact and claim as a right." Now did Mr. Miller use the word "State" in the sense of a political corpus, whatever the form of that corpus be,—whether it be a village or an empire,—we should be inclined to concur in this analysis of "rights." It is true that the individual knows that he is a member of the State, and that he has legal rights in virtue of that membership; while the State knows the individual to be a member of itself, and, in virtue of that membership, recognises his legal rights. It is thus *qua* citizen that the individual has legal rights, and, consequently, apart from recognition by the State there can be no such rights. But in a footnote our author informs us that he uses "State" "as a convenient expression for the *universal*. It is the common *Verstellung* of the universal. But," he adds, "it should be remembered that in this sense *two* persons may form a State, because there is more in the group than the qualities and powers of the two individuals added together." The universal may thus mean the smallest group, or it may mean humanity taken as a whole, and, consequently, Mr. Miller's conception of "rights" is no less indeterminate than his conception of "the idea of right." We are, moreover, unable to understand in what degree Mr. Miller's argument gains in cogency by an appeal to the Kantian categories; or to appreciate the value of the modification, which he proposes, upon Sir Henry Maine's formula of progress.¹

But while we have been compelled to take exception to Mr.

¹ "We must extend Sir Henry Maine's formula by saying that society has progressed from contract (*casualty*) to reciprocity" (p. 807).

Miller's conception of law, we have little exception to take to his general treatment of the subjects with which he deals. His work bears upon it the stamp of a wide culture, and of an easy acquaintanceship with what is best in modern continental speculation. Sometimes his form of expression recalls too vividly the manner of his master, as when he says of the family that it is "the first concrete realization of the universal;" but, in general, his volume is very readable. His applications of his main thesis are frequently ingenious; and he is generally happy, sometimes profuse, in illustration. The statement, however, that the more ignorant people are, the more prone they are to quibble, is made no clearer by a reference to the scene between Titmouse and Huckaback in Warren's well-known novel; nor shall we be more ready to grant our assent to the proposition that "the most noble poor . . . would rather starve than beg," because "this is brought out by Dickens, in the character of Mrs. Betsy Higden, in *Our Mutual Friend*." Sometimes, on the other hand, we are justified in expecting a fuller account of the subjects under treatment, as, for example, in the case of his description of the early forms of procedure. Mr. Miller adds an appendix, containing amongst other matters a useful note on the use and meaning of the terms "Law," "Positive Law," and "Natural Law," an interesting essay on the relation of Law and History, and a Bibliography. The list of writers on Natural Law, Jurisprudence, Sociology, etc., seems fairly complete. Yet, unless we are in error, the names of Savigny, R. V. Thering, Dahn Leist, and C. L. Michelet do not appear; and the least known work of A. H. Post is cited, while the works of A. Bastian are not cited at all.

It is because we consider Mr. Miller's work as a whole interesting and valuable, because suggestive, that we have confined ourselves almost entirely to noting the points which are in our opinion open to exception. It seems to us that in order to form a clear conception of jural relations, it is indispensable to have a clear conception of the relations of the individual to the world within which he lives; and we believe that Mr. Miller's book will materially assist the careful student in forming such a conception.

The Law of Savings Banks since 1878, with a Digest of Decisions made by the Chief Registrar and Assistant Registrars of Friendly Societies from 1878 to 1882. By URQUHART A. FORBES, Barrister-at-Law. London: Stevens & Haynes. 1884.

MR. FORBES is already favourably known as the author of a work on the Law relating to Savings Banks, and the present book is intended as a supplement to that work, showing the changes that have been made in the law since 1878. These changes have been considerable. In 1880 the Savings Bank Act was passed,

which whilst reducing the interest payable to depositors, more than doubled their limit of investment, and gave them a greater interest in the financial welfare of the country by enabling them to purchase Government Stock; in 1882 a Government Annuities Act was passed, which gave the public increased facilities for obtaining annuities or insurances on favourable terms. Under both these Acts regulations have been issued by the National Debt Commissioners and by the Postmaster-General, all of which are given in full. In addition to these Acts and regulations, the law has been further amended by the passing of three Acts whose provisions more or less bear upon matters connected with Savings Banks: these are the "Bankers' Books Evidence Act, 1879," the "Married Women's Property Act, 1882," and the "Provident Nomination and Small Intestacies Act, 1883." The author has, too, with a care not always seen in English law books, given the more important sections of the "Married Women's Property (Scotland) Act, 1881," as governing the law on the subject in this country. Prefixed to the above statutes is a very well written and lucid introduction, in which Mr. Forbes explains the principal provisions of the Acts in detail. To the Acts themselves some useful notes and references are appended. In connection with the Provident Nomination and Small Intestacies Act, we observe that the article on this statute which recently appeared in the pages of this Journal is referred to, and an interesting opinion as to the interpretation of some of the sections of this Act given by Mr. Balfour Paul, the Assistant Registrar of Friendly Societies for Scotland, as counsel at the instance of the National Securities Savings Bank, Edinburgh, are given in an appendix.

Not the least important part of Mr. Forbes' book is his Digest of Decisions under the Savings Banks Acts pronounced by the Registrars of Friendly Societies. Under the Savings Banks Act of 1863, it was enacted that disputes arising between banks and their depositors or persons claiming deposits were to be referred to an official designated "The Barrister-at-Law appointed by the Commissioners for the Reduction of the National Debt." In 1876, however, the jurisdiction in disputes was transferred to the Registrars under the Friendly Society Acts. The Chief Registrar in England and the Assistant Registrars in Scotland and Ireland now hear disputes, and their decision is final, and binding on the parties. The advantage of such a method of settling contested points is obvious. It is cheap, simple, and expeditious: a small fee is charged according to the amount of the deposit in dispute, fixed by a regulation of the Treasury, and the procedure is of the simplest and most informal character possible. As the Registrars must in terms of the statute be barristers or solicitors of some years' standing, the parties are pretty sure of having the matter dealt with by competent hands. This mode of settling disputes seems to be very largely taken advantage of in England, but judging

from the registrars' report the people in Scotland do not seem to take to it so readily. Perhaps "the Shirra" commands their confidence more than an official whom they do not know much about, and whom they may consider as too intimately connected with an English office, and therefore a species of exotic. Be this as it may, however, we have a very interesting series of decisions both Scotch and English in the Digest, though, of course, the latter far outnumber the former. The only Irish case which has been reported has the honour of being reported in a special appendix. In conclusion, we may confidently recommend this book as being of much use, not only to the profession, but to the trustees and managers of Savings Banks. It is clearly written and well arranged.

The Law of Nations considered as Independent Political Communities. On the Rights and Duties of Nations in Time of Peace. By Sir TRAVERS TWISS, D.C.L., F.R.S., etc. A new edition, revised and enlarged.

NOTHING is more significant of the inchoate and imperfectly developed condition of Public International Law in comparison with other departments of jurisprudence, than the different ways in which jurists who treat of it approach the theme, and the varying points of view from which they regard it. The sources of the Law of Nations must clearly be, as in any other science, the same to all students of it; it is in the relative importance which this writer or that attaches to a particular source or class of sources—the different dimensions in which one or the other bulks in his mental vision—that the divergence of view becomes apparent. In this respect the present work is in marked contrast to the last one of importance which we had the pleasure of noticing—Professor Lorimer's *Institutes of the Law of Nations*. Professor Lorimer—as his readers and students are aware—regards the law of nations as still in so backward a state as hardly meriting to be regarded as a positive system of legal doctrine; in which precedent is practically non-existent; speaking slightly of treaties or the awards of international tribunals of arbitration, and though looking for the future development of the science mainly to the intellectual labours of the scientific jurist in the closet, regarding even that as unsatisfying so far as attempted in the past; and evolves his whole system by a process of deductive reasoning from an ethical root in the law of nature. The work before us, on the other hand, is in the so-called practical form peculiar to English jurists. Sir Travers Twiss avowedly does not seek to find an ethical basis for his system. He is content to take the Law of Nations as he finds it now existing in the customs of international

intercourse, the treaties of states, the protocols of congresses and conferences, the decisions of international courts of arbitration, those of national courts, such as prize courts, which occasionally deal with international questions, and the writings of international jurists, and to gather its rules by an induction of such authorities and precedents. While the former author scarcely makes any references except to his former work—the *Institutes of Law*—in which the abstract propositions on which the science of jurisprudence rests are drawn from extra-jural premises, or to other works of a like kind, the latter, when stating a received doctrine, cites the *dicta* of Grotius or Vattel, the terms of a treaty or the ruling of a congress, as a writer on Scots Law, or a debating counsel, might cite Stair or Erskine, or a case in Morrison or Dunlop. The jurist of the one school is on impregnable ground when he says: "It is idle to appeal to statute or precedent here, as you would in a national law court. There can be no legislated or judge-made law between nations, because there is no international legislature or tribunals to make it; nations, regarded as individuals, are still in a state of nature; to nature, therefore, you must go for rules to regulate their intercourse:" while he of the other side appears to have equal reason when he retorts, "The precedents to which I refer you are at least more substantial than the air-built schemes which each speculator may evolve from his own conception of what the law of nations ought to be. My rules are at least founded on the common consent of nations, yours are tainted with your own idiosyncrasies." Sir Travers, though he does not enter into any controversy on this subject, claims that the law of nations, though having no legislature or supreme judge, is none the less a reality.

The present volume, which is apparently to be followed by another to complete the work, as it deals with only half the subject, namely, international relations in time of peace, or what Professor Lorimer would call the "normal jural relations of states," is the second edition; it is, however, considerably enlarged by the new matter required to bring it abreast of recent developments. Having divided the law of nations into "Natural or Necessary Law and Positive or Instituted Law," the author gets rid of the former source in a few words: "The Natural Law of Nations is founded on the Nature of Independent States, as such, and is the result of the relations observed to exist in Nature between nations as Independent Communities." We confess that an attempt to grasp the meaning of this sentence leaves us with hardly a more definite apprehension of knowledge gained than does that of the indisputable proposition that "X is X." He then devotes himself to the consideration of the second factor, regarding the origin of the law of nations as similar to that of municipal laws which arose out of the social wants of individuals in a primitive state. Hence he finds the main source of the law of nations in international usage

and custom—what might be called the “Common Law of Nations.” Treaties being only binding on the contracting parties cannot be of universal application, but are of value in the interpretation of custom. When he points out, however, that, in the earliest historical times, special covenant was the origin and only foundation of inter-tribal intercourse, in the absence of which every stranger was regarded as a natural enemy, and that the spreading of international life was due to the multiplication of such covenants, the question occurs whether custom was not in the first instance a consolidation of such treaties, which it thus followed instead of preceding. This, however, is probably a speculation as little profitable as the celebrated one, whether the hen or the egg was first.

• The known ability and learning of the author require nothing to be said as to the value of the work, already known from the previous edition, within the limits which the author has set for himself. He who wishes to inform himself on the orders of ambassadors and other envoys, the manner in which they are accredited; the rule of salutes at sea; the origin of mercantile and military flags; the interesting question as to whether Switzerland can have a flag on the high seas, will find it all in these pages. In this sense the book is a practical treatise. Nothing is given without authority, and the only authority admitted is conformity to the maxim quoted by Lord Stowell from Grotius—*placuit gentibus*.

The Month.

Legal Infants.—The question of the legal responsibility of minors has been before the public of late on several occasions. It is now decided that there is to be a new trial of the well-known case of *Haines v. Guthrie*. On any special point, therefore, either as affecting this or any other case, we do not propose to comment. Matters now *sub judice* will, of course, be decided on the law as it at present stands. But there is a general question of vital interest to the public, and that is whether the time has not come for some alteration in the present irresponsibility of an infant? The Master of the Rolls has said that any judicial person must look with regret on the defence of infancy when put forward by youths of nineteen or twenty. Mr. Justice Manisty recently expressed very similar views, adding that such a defence appeared to him a very lamentable thing. However, as the law stands, it is a perfectly valid one, and justice bids us blame rather the regulations which afford scope for it. As a general matter of convenience, the absolute atmosphere of artificiality which surrounds the idea of a “necessary” is much to be regretted. It is curious to contemplate the peculiarities of a social status in which an ivory and silver pistol is a necessary and

an air-gun is a mere luxury. Not that it is surprising to find a flaw in the present statutes. A good parliamentary authority stated the other day that of the laws made within his experience only a third were even tolerably good. Of the remainder he reckoned one-half as inoperative and the other as defeating their own objects. Without going so far as this, it is evident that constant revision is pretty often needful. The rules for the protection of minors have been as carefully considered as any that can be cited. There have been strong principles both of public policy and of justice to guide the legislator. Yet it only requires one or two cases involving no special features to cast doubt on the expediency of existing regulations. The other day an Act of Parliament was required for the satisfactory definition of a rabbit-hole. It is now suggested in legal circles that a stricter definition of what is or is not a "necessary" would be quite as useful.

A glance at the state of the law will show on what grounds this suggestion is based. The object which has been kept in view has never varied. The law proclaims every one under the age of one-and-twenty to be an infant, and as such incapable of exercising a number of legal privileges. It follows that it must be equally careful to protect him from incurring full legal liabilities. That it has always done. With regard to his contracts, an infant is strictly guarded from certain of their consequences. He could formerly be sued by the common law for necessities supplied to him and on his ratified contracts. Now he can only be made liable for the former, Lord Tenterden's Act having limited, and the Infants' Relief Act of 1874 having finally abolished, his powers of ratification. All this is clear enough. It is in the extremely variable nature of "necessaries" that the unsatisfactoriness of existing law lies. The somewhat arbitrary precedents which have arisen are altogether unfortunate. Vendors of goods can only sue for the fulfilment of a contract made with an infant when the said goods are deemed necessities. It is therefore natural that there should be a constant effort to enlarge the meaning of the word. But, obviously, this is not for the good of the infant or in the spirit of the Act of 1874. It seems to be equally certain that it is not to the benefit of the *bona fide* vendor. His position is thereby rendered one of great uncertainty. From it he should certainly be relieved. The point is to do this without encroaching on a clear principle of law, and without causing detriment to infants' vendors in general. It must be borne in mind that the judge decides what facts are admissible as evidence, either as being in issue or as being relevant. Among inadmissible facts have been reckoned the income allowed to an infant by his father, and his apparent means to the vendor. This latter, then, in deciding whether he will risk the loss of his goods or the loss of a customer is unable to avail himself of some very tangible indications, which may also be the only ones he has.

On the other hand, the rank and circumstances of the infant and the usages of the society he keeps are all admissible facts. It has been decided that a certain amount of wine was a necessity to an undergraduate, although he happened to be the son of a struggling clergyman with a large family. Costly articles intended for gifts have also been held necessities for infants of high station. There is thus a strong temptation held out to vendors to supply these articles on the chance that a jury will pronounce them to be necessities under the circumstances. Nor is there much fairness in the "serve them right" doctrine too readily applied to tradesmen who fail to recover their debts from infants. Of course we are not speaking of cases where there is any imputation of fraud. In such, no doubt the fraudulent party is seldom the infant. It is in *bona fide* transactions like those which have recently occurred that while the infant is absolutely protected the other party often has a substantial grievance. In these days of keen commercial competition, it is evidently impossible for a tradesman to ask every young officer or undergraduate who may deal with them whether he is of age. Yet unless he do so he may lose heavily.

A notorious result of all this is found in the enormously high prices which follow such uncertain credit. Tradesmen find their only protection against loss in the process known as making the honest pay for all. Under these circumstances it seems worth considering whether the term "necessaries" could not be stripped of its variable and artificial meaning and restored to its natural one. The effect on vendors would be beneficial either way. A necessary being strictly construed as such without regard to the circumstances of the infant, they could then unanimously refuse to sell luxuries without an order from the infant's next friend; or they would obviously sell at their own peril, without hopes of succeeding in a suit or of obtaining any sympathy. Much litigation and not a little scandal would be thereby avoided. With regard to the infants, too, we doubt whether there would be any real hardship. To suggest an extreme case, let bread be supposed a necessity and butter a luxury. This would not touch the ploughboy, but would be terrible for the infant heir to a dukedom, it may be said. But practically it would have no such effect. The period of life at which an infant is exposed to trouble about his contracts is very short. No one trusts the schoolboy in jackets to any ruinous extent, and within some three or four years from that period he is of legal age. Meanwhile it would be a very healthy maxim that luxuries are only necessities to such youths as have ready money with which to pay for them. The ploughboy is daily taught the lesson. The youth of higher station might learn it without such great disadvantage. It would seldom if ever mean hardship. It might mean the substitution of some wholesome self-restraint for the somewhat demoralized irresponsibility which too many "infants" now exhibit.—*The Summary.*

Advocates' Fees.—In the appeal of *Regina v. Doutré* the Judicial Committee of the Privy Council decide some interesting professional questions. It is laid down that when a client retains counsel for professional services he retains him according to the custom and law of the Bar of which he is a member. For instance, if an Englishman happened to meet an English barrister or solicitor in Paris and retained him to conduct his case in a French Court, the rights of the parties would be governed by English and not French law, the place of the contract and the place of the services rendered being irrelevant. Secondly, the Committee entertain "serious doubts" whether in British colonies in which the professions are amalgamated, but in which the English common law prevails, the fee for advocacy due to a practitioner who is both barrister and solicitor can be considered as honorarium. It would have been as well if the Committee had been more positive on a subject which scarcely admits of doubt. The theory of honorarium belongs not to the service rendered, but to the person rendering it. As soon as that person can recover at all for professional services he can recover for all professional services. It has never been questioned that solicitors can recover in this country for advocacy in the County Courts, or any other Court in which they have co-audience with barristers. Thirdly, the Committee decide that the rights of the Canadian lawyer against the Crown are the same as his rights against private clients, as to which it need only be said that it would be very strange if it were not so. In reading the formal judgment of the Committee, which in style and manner is halfway between the recitals of a French judgment or the note to a Scotch interlocutor and the judgment of an ordinary English Court of law, whether at home or abroad, one is struck with the loss sustained by the prohibition of *seriatim* opinions. On a subject of so much interest the judgments in the Court of Appeal and the House of Lords would have been doubly interesting.—*Law Journal*.

Heirlooms.—Modern legislation is undermining gradually, but rapidly, the old-fashioned principle which allowed a founder of a family or other distinguished person to secure to his descendants the possessions upon which he prided himself. This is not the place to inquire how far it is a good or a bad thing to prohibit such attempts at perpetuating a succession in a long line of hereditary claimants; but it must be admitted that in the minds of many people, heirlooms, which were regarded as suitable articles to be so settled upon the heirs "in tail," stand upon a different footing from land, which is the ordinary subject of such family settlements. It might happen that the "dirty acres," as Sir Lucius O'Trigger calls them, were really an encumbrance to the impecunious heir, who had neither the means nor the inclination to use them for the benefit of the nation at large, or even of his

children and descendants, and yet that it would be a distinct loss to posterity if he were allowed to make away with less substantial trophies inherited by him. The old law preserved the latter as well as the former species of property from sudden dissipation at the caprice of a tenant for life, and saved them for subsequent owners, who might have, and often had, a much more just appreciation of their value. Thus scores of precious works of art, collected in the houses of great people, have been rescued from the fatal hammer of the auctioneer, and kept through generations, or even centuries, until their intrinsic merit, or the associations which made them interesting, became discernible in an age more willing to give them their fair honour. What would have become of the pictures, the books, and a hundred other curious relics of bygone times, if it had been within the power of any spendthrift scion of the house to which they belonged to dispose of them, at his pleasure, to the first purchaser who chose to bid for them? Many would have survived, no doubt, and been jealously guarded by dealers or speculators, who hoped one day to make a good bargain by disposing of them as curiosities. But even then they would have been scattered about, exiled from their proper home, and often deprived of that guarantee of genuine authenticity which they now possess. In most families there crops up from time to time a Charles Surface, who is ready to barter away the portraits of his ancestors for a few pounds or shillings, and, in consideration of the price of a dozen of claret, to allow a *chef-d'œuvre* of Sir Peter Lely to be used as a signboard outside an inn. Heirlooms, which, etymologically speaking, mean "parts of an inheritance," being derived from the Saxon word *leoma*, a member, are defined by law writers as "those things which have continually gone with the capital message by custom." The character of the article is thus gained only by lapse of time; for until several generations have succeeded one another, and the property has throughout always remained attached to the freehold, the description cannot apply. No one can acquire a thing and at once make it an heirloom. The most he can do is to direct by his will that it shall be dealt with "as an heirloom;" and this is, as we shall see, a very inefficient method of impressing the desired character on the chattel. Actual *bona fide* heirlooms are comparatively rare, and it is seldom that any article fulfils completely all the requisites presupposed by the lawyers. For, according to Spelman, it must be a "piece of goods of the more solid kind," which cannot readily be detached from the freehold—such as the oak table at which the mediæval household dined, the hall door, the portcullis, the escutcheon hung on the walls at the death of each chief of the family. But although this stricter definition is given by some great authorities, its exclusiveness is impeached by others, who declare that many other things may be properly called heirlooms. Thus, in one

noted case, a lady claimed as heiress the coat, armour, pennons, and sword, which had been hung up in a chapel in honour of the chief of the house into which she married. On the other side appeared the parson, who claimed the things as "oblations," and as affixed to the freehold of the church fabric vested in him. But the lady gained the day; and the judges declared also that graves or tombs and gravestones might also be heirlooms, though these, of course, are rarely attached to the actual freehold of the layman's estate. Then how about jewels? Here there is a manifest conflict of opinion. For, on the one hand, most writers admit that the Crown and the ancient jewels of the realm are properly called heirlooms. And yet, on the other hand, Chief Justice Holt, in *Lady Petre's* case, declared from the bench that neither the pearl necklace she claimed, nor diamonds, nor jewels of any kind, could be rightly described by the term. The learned Viner does not seem to agree with either Spelman or Holt; for he makes the test consist in an inquiry whether the article was or was not customarily enjoyed with the mansion-house. Usually, as he says, it is the best of each sort of domestic articles—the best of the "beds, tables, pots, pans, and such like." This would agree with the provision of the Scotch law as to "heirship movables," giving to the heir, to the exclusion of the executor, the best of the furniture, horses, farming utensils, and the like. Besides the heirlooms, properly so called, there are a variety of "other chattels" always descendible as real estate to the heir or devisee, and not to the personal representatives or next of kin. And it is here that there is the most opening for doubt and litigation. Take, for example, the case of certain animals which are certainly movables in the literal sense of the word, but are yet associated by custom with some sort of real property. Deer, for instance, are creatures attached, like heirlooms, to the inheritance, whenever they are in a real, properly created park; but when the enclosure in which they dwell is only a "reputed" park, it is said that the property in them on the death of an intestate owner passes to the executor. So, similarly, "conies in a warren," which is the orthodox place for them, are deemed heritable property; whereas if they are kept in a "room, cage, or other receptacle," they are part of the personality. Often the test is whether they are wild or tame, but this will not always hold good, and there are almost boundless opportunities for litigation in such a matter. One set of writers maintains that hounds and spaniels go to the heir; another altogether denies it. One author seems to go so far as to give pigeons in general to the heir, but "young pigeons" to the executor. It has been in former times a favourite practice with great people to direct in their wills that certain articles, such as plate and jewels, should be considered as heirlooms, and descend in accordance with the laws as to devolution of family estates. Such wills constantly resulted in lawsuits, but were very rarely effectual to do what the

testator desired. Thus a devise of books in this fashion by the Duke of Buckingham in 1744 gave rise to a costly action. There is a celebrated case in which a Duke of Newcastle was defendant, and a Countess of Lincoln was plaintiff; and, in short, nearly half the noble families existing would find that there had been disputes either in the law courts or at home among some members of them at some time or other over some questions of heirlooms. It was on this subject, by the way, that Lord Eldon, in the House of Lords, delivered one of his most elaborate judgments, disagreeing with that of the first Lord Ellenborough.—*Globe*.

Attaining Twenty-one.—An example of *et aliquando bonus dormitat* will be found to occur in the August number of the *Law Journal Reports* in no less precise a place than a formal judgment of the Judicial Committee of the Privy Council, delivered by no less a judge than Lord Blackburn. In *Letterstedt v. Broers*, an appeal from the Cape, the learned judge says: "The applicant, the only daughter of Jacob Letterstedt, was born on May 13, 1853, and consequently attained the age of twenty-one on May 13, 1874, and the age of twenty-five on May 13, 1878." Unless the cases of *Herbert v. Torball*, 1 Sid. 162, and numerous other cases have been overruled, the lady was twenty-one on May 12, 1874, and twenty-five on May 12, 1878.—*Law Journal*.

Professional Reciprocity.—At the last sitting of the Queensland Supreme Court the Lord Chief Justice made the following remarks:—"When I was at home I took steps, through the Secretary of State for the Colonies, to again submit a proposal to the Inns of Court to give reciprocity of admission to Colonial Barristers. That is still before the authorities at home, and I know that some gentlemen in the most eminent position in law are favourable to the proposition, but how it will fare with the Benchers of the Inns of Court, I am, of course, not aware, but I hope to get an answer before long. I desire now to throw out a hint that it will probably be necessary for us, in the event of the English Bar refusing such reciprocity, to insist upon it, or at all events to refuse to grant admission here unless we get the same privilege at home. The standard of education here is more than equal to that required at home, and I think the time has arrived when we should have something like union between the Colonial Bar and that of England. A very valuable privilege is conceded to the Barristers of England, Ireland, and Scotland here; they do not admit each other, the Bar of England will not admit Scotch or Irish Barristers. It is an absurd state of affairs, but as far as we are concerned, we are disposed to bring it to an end. We are not, however, anxious to shut out our brethren of the English, Irish, and Scotch Bars; our anxiety is to secure an Imperial Bar. I will send a copy of my communication to the Secretary of State, to the Board of Examiners, so that

members of the Bar will be able to see the situation." His Honour subsequently, when the admission of Solicitors was being moved, said: "I may here state that we may probably extend the rule of reciprocity to English, Scottish, and Irish Solicitors."

THE report of the case of *Allen v. Astley* was really funny. That shining light of the Dissenters, Mr. Waddy, chaffed the sporting baronet about his "go-as-you-please" speeches; the cabman showed himself a fine low comedy witness; and the doctor, who should be, if he is not, an Irishman, fairly brought down the house when, in answer to Sir John's query, "Have you ever known a man to be unconscious four or five days, and have been none the worse for it?" he gravely replied, "Only that he died." But a remark made by Sir John Astley to Captain Coventry after the trial, which did not get into the papers, leads us to think that the horse that caused the mischief must be the greatest humorist of the lot. "The fact of the matter is," said the defendant, "that the intelligent brute saw that the van was full of soda-water bottles. He is a strong anti-teetotaler, like his master, and went for it, and there you are!"

BARON ANDERSON once happened to enter an assize town with all the "pomp and majesty" of javelin men and trumpets simultaneously with a travelling menagerie, also accompanied by trumpeters and men in gorgeous trappings. The next day he was asked by a gushing old lady: "Oh, *have* you been to see the elephants yet?" "Well, no," said the Baron. "The fact is, it is a point of precedence; we both came into the town to the sound of trumpets, and the question is, who is to call first?"

Acceptance of Bill.—In *Norton v. Knapp*, Iowa Supreme Court, June 10, 1884, 19 N. W. Rep. 867, it was held that the words "kiss my foot," with the drawee's signature written on the face of a bill presented for acceptance, do not constitute an acceptance. The Court said: "The rule we understand to be, if the drawee does anything with or to the bill, or writes thereon anything which does not clearly negative an intention to accept, then he can or will be charged as an acceptor. The question then is, what construction should be placed on the words 'kiss my foot,' written on the bill and signed by him? They cannot be rejected as surplusage. Such language is not ordinarily used in business circles or polite society. But by their use the defendant meant either to accept or refuse to accept the bill. It cannot be he meant the former, therefore it must be the latter. It seems quite clear to us that the defendant intended, by the use of the contemptuous and vulgar words above stated, to give emphasis to his intention not to accept or have anything to do with the bill or with the plaintiff. We understand the words, in common

parlance, to mean and express contempt for the person to whom the words are addressed, and when used as a reply to a request, they imply, and are understood to mean, a decided, unqualified and contemptuous refusal to comply with such request. In such sense they were undoubtedly used when the defendant was requested to accept the bill. The question asked upon this point must be answered in the negative."—*Albany Law Journal*.

The "Nearest Doctor."—The well-known humanity of the medical profession is put to a further test by a decision of the County Court judge at Exeter on Wednesday last. On a certain Sunday in May one of the congregation at a church in Exeter was taken suddenly ill. The mayor, who was present, immediately sent a boy for a doctor. The doctor arrived, and having ministered to the patient's wants, sent in his bill for the modest sum of five shillings to the mayor. The mayor declined to pay, but suggested that if the patient did not settle the bill it should be sent in to the Watch Committee. This seemed to imply that the mayor's benevolence was in his corporate and not in his individual character, and the doctor, declining to take the suggestion, put the mayor in the County Court. The County Court judge, however, held that "merely sending for the nearest medical man is no contract." This view, if sound, will encourage the practice of much cheap and ostentatious benevolence, and on hot Sundays the doctor who lives near the church will probably spend half his time running to and fro to cut the laces of young ladies who find it convenient to faint during the sermon. But why should this new maxim of English law apply to the nearest doctor only? "Work and labour done at the defendant's request" is a very ancient cause of action which might be supposed to extend to doctors. If a philanthropist finds a person disabled in the street and sends him home in a cab, he must pay the cabman. The good reputation of doctors for self-sacrifice is, however, as little to their worldly advantage as the bad name which may be given to a dog. The "nearest doctor" is so convenient and ready an institution that people are apt to look upon him as a public servant, bound to respond gratuitously to the call of every one in need.—*Law Journal*.

In a notice to subscribers, our contemporary the *Kentucky Law Reporter* says: "Those who do not respond to accounts sent them will take no umbrage at drafts drawn on them for the subscription price. It is impossible to conduct a paper on a list of unpaid subscriptions. We do not propose to try it."

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF ABERDEEN.

2ND JULY 1884.

Sheriff DOVE WILSON.

Imprisonment for non-payment of aliment under the Civil Imprisonment Act of 1882.—The facts appear from the decision.

The Sheriff in deciding the case said: "The question raised by this petition is whether the pursuer is entitled to get a warrant to imprison the defender for a longer or shorter period for non-payment of aliment under the Civil Imprisonment Act of 1882. The facts are simple. The pursuer had a daughter to the defender on the 11th of October 1872. That child she was entitled to keep in her own possession and to aliment, getting half of the expense from the defender, until it attained the age of ten years, which it did on 11th October 1882. During all that period, however, the pursuer wholly supported the child herself, and she did not raise her action against the defender for his half until the 28th July 1883. At that time she got decree for the ten years' aliment due by him; which of course were all then in arrear. The question that is raised now, and it is one of interest and importance, is whether under such a decree she can have the defender imprisoned under the Civil Imprisonment Act of 1882. That is a question which turns partly upon the construction of that Act, and partly upon a consideration of the policy of the Legislature in passing it. That statute was an amendment of the Debtors Act of 1880, and the policy of both the statutes was firstly to relieve the penalties which the law imposes on innocent debtors, and secondly to make the law against culpable debtors more strict. In dealing with culpable debtors it had two branches. In the first it made more severe the criminal enactments against debtors who were fraudulent; and in the second place it made more efficient the provisions for the recovery of alimentary debts. In dealing with alimentary debts, what it did was to do away with the great anomaly which existed formerly when the alimentary creditor was bound to support the debtor in prison at his own expense. That involved the absurdity that a person who, confessedly, could not feed himself must, before he got redress, also be able to feed the person who was depriving him of what was necessary. The amendment of the law, throwing the burden of maintaining the debtor on the public, made it necessary that a public official should limit the time for which imprisonment should be competent, and hence the provisions of the Act of 1882. In order to ascertain whether the defender comes within the class of culpable debtors that were meant to be dealt with by this Act, it is farther necessary to see exactly what it says. The persons who come within the purview of that Act are those who have to pay 'sums decerned for aliment.' That expression may mean one of two things. The expression may include every sum of an alimentary nature, or it may include simply such sums as are to be applied, when they are got, in alimentering the party for whose benefit the decree is pronounced. Now, it is a matter of settled law which of these two constructions is the right one. In the case of

Tevendale v. Duncan, decided last year, there was a full discussion of the point, and it was settled that sums decerned for aliment under this statute meant sums which were to be applied when they were got in alimenting some one. Lord Young gave the leading opinion there, and his judgment was concurred in by Lord Rutherford Clark and the Lord Justice-Clerk, and although Lord Craighill was of a different opinion, it would be useless for me to enter further upon the subject, as I could add nothing to the force of the arguments that were used by the majority. It is no doubt true that the debt in this case is of a somewhat different character from the debt in the case of *Tevendale v. Duncan*. In this case it is a mother who is prosecuting for arrears of aliment which she herself has afforded. In the other case it was a Parochial Board which alimented a pauper and then came upon one of the pauper's relatives for reimbursement, but the principle applicable to both cases seems to me exactly the same. Both are actions for the recovery of aliment that has been disbursed; and the present is plainly not an action that can in any way, except through the pursuer's pleasure, benefit the person to be alimented. This is an action which the pursuer could insist upon even though the child were not now in life. The money is due to the pursuer under a past obligation just as much as if it were money due under a bill, and I don't see any reason why the pursuer who holds this decree might not assign it for a valuable consideration to a third party altogether. The two actions, *Tevendale v. Duncan* and the one that has given rise to the present petition, seem to me, therefore, to deal with debts that are the same in principle, although there may be some difference in detail. It was said further with some force for the petitioner, that if she did not get the remedy of imprisonment, one would be led to the absurdity that a person who neglected to aliment for a month or two after a decree might be imprisoned, while a person might before a decree neglect to aliment for ten years and yet escape imprisonment. That would have been a very strong observation indeed if the object of the statute had been to punish alimentary debtors; but the statute, with the greatest care, has avoided anything like the punishment of that class of debtors, and has restricted itself solely to the object of making the remedy more efficient in order that the person that was to be alimented might obtain the necessaries of life. The inconvenience also was pointed out by the petitioner, that the result of finding imprisonment incompetent here would be in very many cases to cause a distinction to be made in enforcing decrees for aliment. It was pointed out that there are few of these cases that are brought immediately upon the birth, and that in many of them there is a decree for a period of arrears due at the date of the petition as well as for a period of future aliment, and it was pointed out that this decision would have the effect of making the remedy for the arrears different from what it was for the rest. That is quite true; but that is an inconvenience which was pointed out by Lord Craighill in the case of *Tevendale v. Duncan*, and as it did not weigh with the majority there, it is impossible it can weigh with me here. There will undoubtedly be that inconvenience, but I do not know that the fact of that inconvenience arising will be any great misfortune, because it will have one effect,—and a very good one,—

* it will make pursuers of claims like this understand more fully than

they sometimes seem to do at present that it is a matter of great consequence for them to bring actions at once, and not to delay raising the question of alimentering an illegitimate child for three, four, five years, or even for a longer period. Upon the whole matter I entertain no doubt that this application is incompetent, and therefore I dismiss it. I do not find either party entitled to expenses."

For pursuer—Mr. J. D. Mackie. For defender—Mr. G. N. Aiken, representing Mr. A. E. Smith.

SHERIFF COURT OF CUPAR.

Sheriff-Substitute HENDERSON and Sheriff CRICHTON.

THE HERITORS OF MOONZIE *v.* JOHN INGLIS.

Parochial assessments — Feu-disposition — Obligation of relief — Title to sue.—The following interlocutors explain the circumstances of the case :—

"*Cupar, 19th May 1884.*—The Sheriff-Substitnte having heard parties' procurators and considered the record and whole process, sustains the second plea-in-law for defender, and dismisses the action accordingly, and decerns: Finds the pursuers liable to the defender in the expenses incurred by him in the process: Allows an account thereof to be given in, and remits the same when lodged to the auditor of Court for taxation. (Signed) "A. EDWARD HENDERSON.

"*Note.*—The pursuers, who are the whole heritors of the parish of Moonzie with the exception of the defender, and their clerk, and the widow and executrix of a deceased heritor, bring this action against the defender as an heritor of that parish for the balance of certain assessments for parochial burdens, which they allege he is liable for, and is still due. These assessments have been laid on the defender on the footing that he is liable to the extent of one-half of the whole amount leviable from the lands held by himself and his nephew, Mr. Inglis of Colluthie (one of the pursuers). This claim is based upon a clause in a feu-disposition, dated in 1828, granted by the uncle of the defender, the then proprietor of Colluthie, to the defender's father. By that feu-disposition there is disposed a portion of the lands of Colluthie, which is now called Newington, to the defender's father and his heirs and assignees, and there follows the clause in question which provides that the dispoonee and his heirs shall pay one-half of the stipend exigible from the whole lands of Colluthie, and also relieve the proprietor of Colluthie of one-half of all future parochial burdens which might be levied or assessed on the whole lands of Newington. The defender, so far as appears on record, has been assessed in accordance with the obligation undertaken in this feu-disposition, and all parochial burdens payable from the whole lands of Colluthie in the parish of Moonzie have been charged in equal proportions against the proprietor of Colluthie and him. He, however, objects to this mode of levying the assessments, and maintains that in a question with the heritors of the parish of Moonzie, he is only liable to be sued for the proportion of the assessments effeiring to the value of his lands in that

parish as it appears in the valuation roll; and that the heritors have no right or title to enforce an obligation in a feu-disposition which as regards them it is *jus tertii* to attempt to sue upon. He supports this contention by referring to another clause in the feu-disposition by which it is provided that the proprietor of Colluthie shall pay the 'bridge and rogue money' and other county assessments payable from the whole lands of Colluthie without recourse on the 'feu-dispensee.' In order to meet this defence the proprietor of Colluthie and his mother, the widow of the late proprietor (during whose lifetime part of the assessments, the balance of which is sued for, were laid on), are made to concur in the action along with the heritors and their clerk. It is thought that this concurrence cannot validate the claim of the heritors. The heritors, no doubt, have an interest to recover the defender's share of the assessments, provided they have been duly and regularly laid on the respective heritors in the parish collectively; but this right does not extend to enforcing an obligation of relief in a private deed. The effect of sustaining their right to sue upon this obligation is brought into a strong light by considering the fact that the defender maintains that the proprietors of Colluthie have not fulfilled their counterpart obligation to pay the county assessments for the whole lands. This, if correct, would involve a prolonged inquiry, and an action, which on the face of it is merely a petitory one, for a balance of assessments past due would be turned into a complicated accounting. Moreover, if the pursuers' position were well founded, the defender on his part, under the counter-obligation in which he is a creditor, might call upon the collector of the county assessments to claim all these assessments due from the whole lands of Colluthie from the present proprietor of Colluthie, and failing payment grant his concurrence to an action for their recovery. Such a proceeding appears at once incompetent and most inconvenient. The appropriate mode of procedure would appear to be for the heritors to call on the defender to pay the proportion of the parochial assessments due to him, calculated on his rental as valued or as appearing in the valuation roll, whichever be the mode prescribed by their practice, and to leave the proprietors of Colluthie and Newington to settle their disputes between themselves. Considerable reluctance has been felt in dismissing the action, but looking to the fact that there are no conclusions setting forth the separate amount claimed by the heritors and the other pursuers respectively, and that there are neither on record nor in process any statements or materials by means of which the action can be worked out to any operative effect, it is thought that no other course can be followed than the one which has been taken. To allow any amendment in the direction indicated would, it is feared, be to alter and extend the grounds of action.

(Intd.) "A. Ed. H."

"*Edinburgh, 26th June 1884.*—The Sheriff having heard parties' procurators on the appeal for the pursuers, and considered the record and whole cause, dismisses said appeal: Adheres to the interlocutor of the Sheriff-Substitute of 19th May 1884, and decerns: Finds the defender entitled to additional expenses: Allows an account thereof to be given in, and remits the same when lodged to the auditor to tax and to report.

(Signed) "JAS. ARTHUR CRICHTON."

"*Note.*—In 1828, John Inglis and Henry Inglis (who were brothers) purchased the estate of Colluthie, which, it was agreed, should be divided

between them. In carrying out the transaction the sellers disposed the whole estate of Colluthie to John Inglis (who was the father of the defender John Inglis), and then he granted a feu-disposition in favour of his brother, the said Henry Inglis (who was the father of the defender John Inglis), to certain portions of the estate of Colluthie. These lands are now called Newington.

"The said feu-disposition by John Inglis in favour of his brother Henry Inglis contains a clause by which Henry binds and obliges himself, 'his heirs and assignees, to relieve the said John Inglis and his foresaids of the sum of £7, 9s. 8½d., being the one-half of the money stipend presently payable to the minister of Moonzie for the whole lands of Colluthie; and of £5, 3s. 6d. sterling, being the whole schoolmaster's salary presently payable from the said lands of Colluthie; and also . . . of the one-half of all future augmentations of stipend, schoolmaster's salary, and parochial burdens or repairs that may be levied or assessed on the whole lands of Colluthie.' Then there follows a counter-obligation by the said John Inglis in the following terms: 'I and my foresaids being, however, bound to pay the bridge and rogue money and other county assessments payable from the whole lands of Colluthie without recourse on the said Henry Inglis.'

"The pursuers aver that since the date of the said feu-disposition the heritors have in levying the assessments payable by them given effect to the above contention by dividing the whole assessment on the entire lands of Colluthie equally between the lands now called Colluthie and those called Newington. It would appear that the defender's father paid assessments levied in this way, and the defender admits that he also has done so. Some years ago, however, he objected to do this, and insisted that the assessments should be levied on him according to the annual value of his property as that appears in the valuation roll.

"The present action has been brought by the heritors of Moonzie to compel the defender to pay one-half of the total sum levied from the whole lands of Colluthie, on the allegation that it has been the custom of the heritors so to assess the lands of Newington; and this custom has been acquiesced in, and approved of, by the defender and his predecessors. The defender pleads that the action should be dismissed, as the pursuers have no right or title to enforce a stipulation in the feu-disposition of 1828. On the other hand, the pursuers argued that they were not seeking to enforce the stipulation in the feu-disposition, but a usage which had been followed since 1828 in levying the assessments. In the opinion of the Sheriff this contention is not well founded. Although the defender and his predecessors may, since 1828, have paid the assessments to the pursuers in terms of the obligation contained in the feu-disposition, this would not make a usage or custom upon which the pursuers would be entitled to found. The action, therefore, has been rightly dismissed by the Sheriff-Substitute.

(Intd.) "J. A. C."

Act. Messrs. W. A. & J. M. Taylor—All. R. W. Renton.

SHERIFF SMALL DEBT COURT, DUNDEE.

Sheriff CHEYNE.

WHEELER & WILSON SEWING MACHINE COMPANY v. M'RTCHIE
AND BRUCE.

Sheriff Cheyne's decision was in the following terms:—"This is an action for £7, 10s. claimed as the value of a sewing machine alleged to belong to the pursuers, and to have been wrongfully and illegally sequestrated and afterwards sold by the defenders for the rent of a dwelling-house tenanted by a Mrs. Craig, who, it is stated, had the machine on hire from the pursuers at a monthly rent of 10s., under a written agreement, dated 18th June 1883. The defenders' agent declined—and, I think, in view of an opinion which I recently expressed upon the point, properly declined—to raise any question as to the character of the agreement (which is in the ordinary terms, so familiar to the judges who preside in Small Debt Courts, upon which sewing machines are lent out, viz. what is known as the 'hire purchase system,' and which, I may add in passing, was proved to have been shown to the sheriff officer prior to the sale), and invited my judgment upon the broad question whether a sewing machine held on hire by a tenant of a dwelling-house falls under the landlord's hypothec? This question I answer in the negative. It is undoubtedly settled by a series of decisions pronounced in the early part of this century, and in accordance with the dictum of Bankton (i. 17, 10), that hired furniture is subject to the landlord's hypothec, but with, so far as I know, only one exception (to be immediately noticed), all the cases in which the doctrine has been applied will be found to be cases in which the whole, or at least a considerable portion, of the plenishing of a house was hired from a broker—a practice which appears to have been at that period not uncommon. But whether you rest the judgment in these cases upon the ground that the broker, by consenting to supply the whole, or a large portion, of the furniture, must be understood to have agreed to its being liable for the rent, for which he was bound to know that the landlord was entitled to have security in the shape of plenishing, or upon the doctrine of reputed ownership engendering credit, it humbly appears to me that there is a material distinction between them and the case of a single article hired out for a limited and short time. I am aware, indeed, that an attempt was unsuccessfully made to get this distinction judicially recognised in the case of *Penon v. Robertson*, 6th June 1820, F. C., where the Court held a musical instrument lent out for hire liable to the landlord's hypothec, and I must admit that this case has created a little difficulty in my mind. The report is, however, rather meagre as regards the circumstances (for example, the time for which the instrument was hired is not stated); and looking to that, and to what fell from Lord Deas in *Adam v. Sutherland*, 3rd November 1863, 2 M. 6, and from the Lord President and Lord Deas in the recent case of *Nelmes & Co. v. Ewing*, 23rd November 1883, 11 R. 193, I think I am justified in holding either that *Penon's* case laid down no general doctrine, or if it did, that the point decided in it may now in the changed circumstances of the times be held open for reconsideration. But assuming I am right in that view,

I ask myself whether the same reason for presuming or inferring the owner's consent to his goods being hypothecated for the hirer's rent exists in the case of a person who hires out a single article as exists in the case of a person who hires out what forms the whole or a great portion of the plenishing of a house. Now I find myself unable to affirm that proposition. On the contrary, while I see strong ground for presuming the consent in the latter case, I cannot see the slightest ground for presuming it in the former. Neither a sewing machine nor a piano is an article of ordinary household furniture, both falling rather under the category of luxuries; and a person hiring out either one or the other is, I think, entitled to assume that the hirer's house is otherwise sufficiently plenished, and cannot in any reasonable view be held as implied by giving his consent to his article forming part of the landlord's security. Neither, I think, is there room for holding the hired sewing machine or the hired piano subject to the landlord's hypothec upon the ground of reputed ownership. The practice of people having sewing machines and pianos on hire is now so extremely common, that a landlord is not warranted in assuming, without inquiry, that a sewing machine or a piano that he finds in his tenant's house is the tenant's property, or in giving the tenant credit on the strength of its being his property. It would now-a-days be more reasonable for him to proceed upon the opposite assumption—namely, that the article was not the tenant's property; and it must be kept in mind that if the other articles in the house are not of sufficient value to form an adequate security for the rent, the landlord always has it in his power to call upon the tenant to put in additional plenishing. These considerations suggest to my mind that the distinction pleaded for by the petitioners in *Penson's* case is really a well-founded one; and when, in addition to that, I think of the practical inconveniences that would follow the adoption of a view different from what I am now to give effect to, and remember that the recent tendency alike of legislation and of decisions has been to limit the scope of the landlord's hypothec, I have very little doubt that if *Penson's* case came up now the decision would not be repeated, and as little hesitation in holding in the case before me that the sewing machine in question did not fall under the hypothec, and that its sale under the sequestration was wrongful and illegal. This conclusion is in accordance with some reported decisions in the Sheriff Courts of Perthshire and Lanarkshire (see *Journal of Juris.* xxv. 499, xxvi. 445, and xxviii. 277), and it may be satisfactory to the parties to know, as it is certainly satisfactory to me to state, that it is concurred in by Sheriff Trayner, with whom I have since the hearing had an opportunity of discussing the question. I have only to add that I think it fair to allow the defenders credit for the amount of hire paid by Mrs. Craig while she had the machine (which, I understand, was 27s.). The decree will therefore be for £6, 3s., with 12s. 7d. of expenses; and it will be accompanied by a declaration that the pursuers are, if required, to assign over to the defenders any claim they may have against Mrs. Craig in respect of arrears of hire."

Agent for pursuers—W. B. Milne. Agent for defenders—J. Rattray.

SHERIFF COURT OF LANARKSHIRE.

Sheriffs BALFOUR and CLARK.

PURDON v. PURDON.

Imprisonment for aliment—Civil Imprisonment Act, 1882—Petition to imprison—Decree following upon action distinguished from decree following upon agreement.—The following interlocutors explain the circumstances of this case:—

“*Glasgow, 28th February 1884.*—Having heard parties’ procurators: Finds, for the reasons stated in the annexed note, that the petition is incompetent, therefore dismisses it: Finds no expenses due, and decerns.

(Signed) “D. D. BALFOUR.

“*Note.*—The pursuer is the wife of the defender, and on 24th November 1883 they entered into a memorandum of agreement whereby they agreed to live separately, and the defender agreed to pay to the pursuer aliment at the rate of 5s. per week. The agreement is recorded in the Books of Council and Session for preservation and execution, and the Court has granted warrant for all lawful execution in the extract. The question arises, Is a petition to imprison a debtor under an agreement of that sort competent under the Act of 1882? The phraseology of the Act is quite clear. It provides for the debtor being committed to prison for six weeks until payment of the sums of aliment and expenses of process decerned for, and the person who is to be committed to prison is one who wilfully fails to pay any sums of aliment, together with the expenses of process, for which decree has been pronounced against him by any competent Court. It further provides that a warrant is not to be granted if it is proved that the debtor has not since the commencement of the action in which the decree was pronounced possessed the means of paying the aliment. That language is quite clear, and points distinctly to an action being commenced and a decree being pronounced in it, and to the decree including the expenses of process. The pursuer’s agent maintained that a person who is bound to pay money under a written agreement, which has in virtue of a clause to that effect been recorded in the Books of Council and Session for preservation and execution, and on which recording and extract a charge has been delivered, is a debtor in terms of the Act 1882, and that an application is competent to have him imprisoned under that Act. The pursuer’s agent made an analysis of the expressions used in the Act, and he endeavoured to show that the presenting of the agreement for registration was equivalent to commencing an action, and that the obtaining of the warrant for all lawful execution was equivalent to the pronouncing of a decree, and that the obligation by the defender in the agreement to pay all expenses incurred to the pursuer’s agent was equivalent to a decerniture for the expenses of process in an action. All this is certainly ingenious enough, but the question remains, Is it what the Act of 1882 contemplates and provides for? No one using ordinary language would say that the presentment of a deed to the keeper of a register, and obtaining an extract of it, was really commencing an action in Court and obtaining decree in the action, and certainly no one would say that an obligation in a mutual deed by a person to pay another party’s expenses was equivalent to that other party obtaining decree

against him for expenses of process. One may not see much reason for the Act applying to a litigated claim of aliment and not to a conventional claim, unless it be that the Sheriff-Substitute before whom the action has been depending is supposed to know the merits of the case, and therefore to be a better judge as to whether imprisonment should follow on his decree. The answer to that, of course, is that in the application itself for a warrant to imprison, the judge may make all necessary inquiries and ascertain the general merits of the case. But whatever the reason may be, the fact remains that the phraseology of the Act clearly points to an application for imprisonment being applied for as the outcome of an action in a competent Court in which decree has been pronounced for the aliment together with the expenses of process. Among other things, my attention was called to the Act of Sederunt, dated 8th January 1881, which refers to an extract being issued of a decree proceeding upon a deed, and in the second section of that Act of Sederunt it is stipulated that the form of warrant containing words 'under the pain of poinding and imprisonment' shall apply to extract decrees for payment of aliment. It will be noticed, however, that this Act of Sederunt was passed in 1881, and the statute under which the present proceeding is taken was passed in the following year. The statute (1882) restricts the liability of alimentary debtors to imprisonment for the space of six weeks, and therefore, while the foresaid Act of Sederunt may be referred to as showing that warrants for execution of recorded deeds are called extract 'decrees,' and that under the Act of 1880 alimentary debtors were liable to imprisonment upon such diligence, it cannot be founded on as showing that, in the light of the restricted phraseology introduced into the more recent Act of 1882, extract decrees of a recorded deed are to be the foundation of warrants of imprisonment.

(Intd.) D. D. B."

The case was appealed, and Sheriff-Principal Clark pronounced the following interlocutor:—

"*Glasgow, 16th July 1884.*—Having heard parties' procurators and considered the cause: Finds that the question raised on appeal being one of jurisdiction, the appeal is competent; but for the reasons assigned in the subjoined note, adheres to the interlocutor appealed against: Finds no expenses due in respect of this appeal, and decerns.

(Intd.) "F. W. C.

"*Note.*—The first question to be determined here is as to the competency of the appeal, the respondent having strenuously contended that it was not competent. Now, while there is good reason for maintaining that when the Sheriff-Substitute has, in the exercise of the power conferred by the Act of 1882, refused to award imprisonment for an alimentary debt that cannot be awarded by the Sheriff on appeal, a very different question presents itself where the Sheriff-Substitute has refused to entertain the application for imprisonment at all on the ground that to do so would exceed his statutory powers. The former involves the merits of the cause, the latter merely a question of jurisdiction, and the latter is the question here raised. Now I can discover nothing in the Act to bar an appeal to the Sheriff on such a question. Assuming, for the sake of argument, that the Sheriff-Substitute is wrong in holding that he does not possess jurisdiction, the means must exist somewhere of setting him right. In England

this would be by *mandamus*. In Scotland, I apprehend, it is by appeal. But there is nothing in the Act limiting that appeal to the Supreme Court, nor is there anything disabling the Sheriff from entertaining such appeal. I am therefore of opinion that the respondent's contention on this point falls to be repelled (see *Leitch v. Scottish Legal Burial Society*, 1870, p. 42). But then comes the important question. Is the Sheriff-Substitute right in holding that he has no jurisdiction to entertain an application for imprisonment on an alimentary debt where decree has not issued in an action raised for that purpose, but where all that is founded on is the extract of a deed registered for execution. The question is one certainly not free from difficulty, yet on full consideration I am inclined to concur with the Sheriff-Substitute. The Legislature, it will be observed, abolishes imprisonment for civil debt as a rule; and though it makes an exception in cases of aliment, the kind of imprisonment it provides is entirely new, differing in procedure, in nature, and in extent from that which it superseded. The warrant, instead of issuing, as a matter of course, on an expired charge, can only be obtained by the sentence of a judge who has made a judicial examination into the nature of the case, and is satisfied that such a measure is proper in the circumstances. The imprisonment which follows is not of the old kind, where the party was maintained in jail at the expense of the incarcerator, and where he was treated as a civil debtor. He is now maintained at the public cost, and is treated in every respect as though he were imprisoned for contempt of Court. Lastly, the term of imprisonment is limited to six weeks, and the prisoner cannot take benefit by the Act of Grace by *cessio bonorum* or analogous procedure. This kind of imprisonment is thus purely a creation of the statute, and must be dealt with according to the statutory provisions made thereon, and not in accordance with any analogy drawn from the old procedure in personal diligence. Now the Act is entirely silent as to imprisonment of this kind following upon registration for execution. It speaks nothing of this any more than it does of the analogous procedure by extract registered protest in the case of bills or notes granted for alimentary purposes. All it speaks of is decrees in 'processes' or 'actions' of aliment, and to those the kind of imprisonment it enacts seems only to apply (see sec. 4 and sub-sec. 3). And when the subject is considered there seems good ground for this limitation. The theory on which the Legislature goes is obviously that the species of imprisonment it provides shall not follow as a matter of course, but only when in the estimation of the Sheriff the case warrants that extreme measure. Now, apart altogether from the hard case of a debtor who would gladly pay if only he had the means, it is obvious that the community who are now charged with his maintenance while in jail ought not to be put to such charges when there is no reasonable prospect of his imprisonment enforcing payment, or where it is not warrantable as a punishment. But unless the decree on which the application for imprisonment proceeds were the outcome of a regular process, the Sheriff would often be deprived of the most effective means of informing himself of the real character of the case, and whether it was or was not one warranting him in awarding imprisonment. Hence it seems to me that the Sheriff-Substitute is right in holding that the statute does not apply to cases like the present, and that it was not the intention of the Legislature that it should.

(Intd.) F. W. C."

Ad. Sinclair—Alk. Wark.

SHERIFF COURT OF ZETLAND.

Sheriff THOMS and Sheriff-Substitute RAMPINI.

ROSS v. MANSON.

Filiation Case.—Inlying expenses paid by mother, but beyond usual scale where no specialty in the case warrant an exception, disallowed, and usual sum decerned for.

The above important point arose in this case.

“*Lerwick, 3rd July 1884.*—The Sheriff-Substitute having heard parties’ procurators made avizandum, and having considered the closed record, proof productions, and whole process: Finds in point of fact that the defender admits the paternity of the pursuer’s child, which was born on 12th December 1883: Finds in point of law that the defender is liable (1) in payment of the inlying expenses, which amount, as per receipt produced in process, to three pounds sterling; and (2) in payment of aliment for the said child at the rate of four pounds sterling per annum; therefore decerns against the defender, in favour of the pursuer, for the said sum of three pounds sterling, with the legal interest thereon from 12th December 1883 till payment, and aliment for said child at the rate of four pounds sterling per annum for seven years, payable quarterly, and in advance as from the said 12th December 1883, with the legal interest on each instalment from the date of its becoming due till payment, but always under deduction of the sum of two pounds sterling paid to account of said aliment on 25th December 1883: Finds the defender liable to the pursuer in the expenses of process, of which allows an account to be given in, and remits the same when lodged to the auditor of Court to tax and report.

(Signed) “CHARLES RAMPINI.

“*Note.*—The Sheriff-Substitute is of opinion that there is nothing in the proof to justify any increase in the ordinary rate of aliment allowed in such cases in Shetland. The defender is, however, plainly liable for the inlying expenses, which, as appears from the receipt of the medical attendant put in, amount to £3. (Intd.) C. R.”

“*Lerwick, 5th July 1884.*—The defender appeals to the Sheriff.

(Signed) “ALEXANDER MACGREGOR,
Solr., Lerwick, Agent for Defr.

“*Note.*—The appeal is on the question of the expenses only, and the parties concur in asking the Sheriff to dispose of the appeal without reclaiming petition and answers.

(Signed) “J. KIRKLAND GALLOWAY,
Pror. for Pur.,
“ALEX. MACGREGOR for Defr.”

“The Sheriff having considered the defender’s appeal, remits to the Sheriff-Clerk or his depute to report on the amount of inlying expenses generally allowed in this Court in actions of filiation, and that *quam primum*.

(Signed) “GEO. H. THOMS.

“LERWICK, 15th July 1884.”

"*Lerwick, 15th July 1884.*—In obedience to the above order of Sheriff, I beg leave to report that the sum of two pounds sterling is the amount of inlying expenses invariably allowed in this Court in actions of filiation.

"Humbly reported by

(Signed)

"J. SCOTT SMITH,
Sheriff-Clerk of Zetland."

"The Sheriff having resumed consideration of the defender's appeal, and considered the process and the report of the Sheriff-Clerk, sustains said appeal, and reduces the amount of inlying expenses to two pounds sterling, and to this extent recalls the interlocutor of 3rd July current, and *quoad ultra* adheres thereto: Finds the defender entitled to the expenses of the appeal, as the same may be taxed, and decerns.

(Signed) "GEO. H. THOMS.

"*LERWICK, 30th July 1884.*

"*Note.*—If it had been proved that there were special circumstances connected with the pursuer's confinement which entitled the medical attendant to an extra fee, the Sheriff would have been prepared to consider whether any departure from the ordinary fee should be made. But no such special case has been made out, and the Sheriff has given effect to the Sheriff-Clerk's report. £1, 10s. is, according to the Sheriff's recollection, the allowance in his other counties, and even in the county of Renfrew it was only the other day that the allowance was increased from £1, 10s. to £2, 2s. A. B. and C. D., February 1875; Guthrie's Select Sheriff-Court Decisions, p. 44.

(Intd.) "G. H. T."

Notes of English, American, and Colonial Cases.

MARINE INSURANCE.—*Separate policies on ship and freight—Collision—Abandonment—Payment for total loss on ship—Right of underwriters on ship to damages recovered by assured for unearned freight.*—The defendants effected a policy of insurance on their ship for £1000 with the plaintiffs; but insured the freight with other underwriters. The ship, while proceeding to her port of loading under a charter-party, was run into and damaged by another ship. The defendants abandoned her to the plaintiffs, who settled with them as for a total loss. The plaintiffs afterwards recovered in the Admiralty Division against the owner of the other ship, damages in respect of the loss of the ship, and also of the freight which had not been earned. *Held*, that the plaintiffs were not entitled to recover the damages recovered in respect of the loss of freight, such damages being in the nature of salvage on freight, for freight which has not been earned is not an incident of the ownership of the ship, and does not therefore pass to the underwriters, who have paid as for a total loss on the ship.—*The Sea Insurance Co. (Lim.) v. Hadden*, 52 L. J. Rep. A. B. 252.

THE JOURNAL OF JURISPRUDENCE.

MR. BRIGGS' BABY.—II.

(Concluded from p. 459.)

To resume the details of this unhappy case, in part narrated in our last number. No way out of the difficulty about the boy's name having suggested itself, Mr. Briggs at last brought matters to a crisis by announcing one morning that he had asked Mr. Stobbs, the parish clergyman, to call next day and baptize the child. Mrs. Briggs retaliated by telegraphing for her mother, and that same evening Mrs. Higgins arrived. Mr. Briggs received his mother-in-law with extreme courtesy; indeed, to tell the truth, he stood in no slight awe of that lady, whose stature exceeded his by quite four inches. Nevertheless he kept his own counsel. Nothing passed that evening, and it was not until the next forenoon that Mrs. Higgins asked for a private interview, which was at once accorded. She began by some general whimpers about the unhappiness of her poor Maria, and then by degrees she got upon the subject of the child's name, and tried by gentle persuasion to steal round Mr. Briggs' flank. To no purpose; he had made up his mind, and when Mr. Briggs had made up his mind one might just as well have spoken to the mantelpiece. Gradually the lady began to take a higher tone, her voice grew louder, and her manner more excited. It was no use. Mr. Briggs was quite firm. There he stood with his back to the fire, drawn up to his full five foot six, facing his angry relative with the utmost resolution. At last the lady rose terrible in her righteous indignation, and walked up till her chin almost touched her son-in-law's eyebrows. Mr. Briggs' teeth audibly chattered, but still he held his ground.

"You know who you are speaking to?" hissed the lady.

"Mrs. Higgins, I believe."

"And you decline to give way in this matter?"

"Most certainly."

"Your decision is final?"

"Absolutely."

"And you have fully considered the consequences?"

"I know of none further than this, that my child shall bear a name which will not make him ridiculous."

"Is that all you have to say to me, sir?"

"All, except to request that you shall immediately leave my house."

There was an awful pause.

"You have presumed, sir?" said Mrs. Higgins at last, slowly unbuttoning her cuffs. "You have presumed to order me to leave *my daughter's house*?"

"I have ordered you to leave *my* house, and I mean to enforce the order," replied Mr. Briggs, sharply ringing the bell, and at the same time stooping to fortify himself with the poker.

The moment Mrs. Higgins saw Mr. Briggs armed with a lethal weapon, she recognised her mistake. In the hardihood of her own superabundant strength, she—the tried champion of the cause of woman—had nearly fatally compromised her position by allowing herself to forget that the empire of woman is a moral and not a physical dominion. She contented herself, therefore, by letting fall upon a cabinet beside her one blow of defiance, which luckily missed the inkstand, although it shattered into a thousand fragments a plaster bust of Auguste Comte; and she was already seated and rearranging her cuffs when the housemaid appeared.

"Mary!"

"Mary!"

"Yes, sir, and mum."

"Go for a policeman."

"Yes, sir."

"Call your mistress."

"Yes, mum."

Mrs. Briggs happened to be dressing when the servant summoned her, so that on entering the morning-room she had hardly time to get an explanation of the treatment to which her mother and the bust of her "dear Auguste" had been subjected ere the policeman appeared; but none the less was she quite equal to the occasion.

"Policeman!" exclaimed husband and wife, in the same breath the instant that functionary appeared at the door of the room.

"Eject that old woman there immediately from my house."

"Instantly remove that ruffian from my dwelling."

The policeman was puzzled. He was a man of middle life, and he had been brought up in the days when the harsh traditions of the past taught the authorities to regard the man as the master in his own house. He was himself, however, a man of intelligence, and he was not ignorant of the change which had come over both public opinion and the spirit of the law. He had learned to understand that, to husband and wife, equal authority should be

assigned within the domestic circle. Accordingly, in the present circumstances he was quite puzzled how to act, whether to obey Mr. Briggs and eject Mrs. Higgins, or to obey Mrs. Briggs and forcibly remove her husband from his own hearthrug. Two other alternatives suggested themselves to puzzle him still further. He might regard the two orders as rendering each other nugatory, and obey neither of them ; or, on the other hand, by a more severe logic, he might regard them as cumulative rather than conflicting, and drag both Mrs. Higgins and Mr. Briggs together into the street. Never did incident happen which more clearly illustrated the inconvenience of a dual control within the household. Under the old law, Mr. Briggs would undoubtedly have been entitled to eject his mother-in-law by force if need were from the house ; but already the principle had come to be clearly recognised that the spouses are on an equal footing, and therefore that the command of the wife is of equal authority with the command of the husband. Accordingly, with the best intentions in the world, the policeman was quite at a loss how to proceed. How the matter would have resolved itself it is impossible to determine, but fortunately the policeman was spared the trouble of deciding the perplexing question by the arrival of Mr. Stobbs, the clergyman, who came just in time to find that a grievous domestic dissension called more urgently for his ministrations than the proposed admission of a youthful member into the bosom of the Church. Never, perhaps, has the humanizing influence of religion appeared to more conspicuous advantage than on this remarkable occasion. Sentiment and interest seemed to conspire to prejudice Mr. Stobbs in favour of Mr. Briggs. Both were males. Mr. Briggs was a staunch Churchman, whilst on the other hand his wife was a devoted Positivist. Mr. Briggs, too, sought to create a further impression in his favour by appealing to what have been supposed to be the sanctions of that very religion which Mr. Stobbs professed, and hastened to heap precept upon precept and text upon text from the law of Moses and the writings of St. Paul. But deaf to all these considerations, which might have weighed powerfully with a man of narrower understanding, Mr. Stobbs from the outset assumed an attitude of the most strict impartiality ; and it was not long before he succeeded in reconciling both parties to a satisfactory way out of the difficulty. He reminded them of the auspicious event announced that very morning in the newspapers, how that most bigoted and narrow-minded body, the Faculty of Advocates, had at last so far overcome their inveterate prejudices as to elect a lady, Miss Bell, to the office of Dean. Now what could be more appropriate than to refer this unhappy dispute to the new Dean of Faculty ? With this suggestion both parties at once fell in, Mrs. Briggs counting upon the fact that the Dean was a female, Mr. Briggs relying upon the consideration that although no doubt a woman, the Dean was also a lawyer ; and himself trained in the

days when Fraser was an authority, he confidently believed that the law was on his side.

To the Dean of Faculty the matter was accordingly referred, whether the child was to be called Robert, in accordance with the wishes of its father, or Sophia, in compliance with the desire of its mother. A further proviso was inserted in the Deed of Submission, to the effect that, if the Dean should find herself unable to decide the question of right as between husband and wife, both parties bound themselves to acquiesce in any name which the Dean might herself assign to the child.

After several hearings and considerable delay, the Dean at length issued her award. This was to the effect that as undoubtedly in the present state of the law the spouses possessed equal authority within the family, the arbiter found herself unable to decide the question as one of right or law between them, and accordingly she was thrown back upon the clause empowering her to choose a name for the child herself. She had been strongly impressed by the beauty and propriety of Mrs. Briggs' proposal to make the naming of the child the occasion to break down another barrier between the sexes, and accordingly she had determined to give the boy one of those names hitherto regarded as appropriate to females. Now it so happened that the child's birth had occurred on the very day of the satisfactory conclusion of the negotiations with Spain for the surrender of Gibraltar. What could be more graceful than to name the child for the British plenipotentiary who had brought these negotiations to so honourable an issue—Mrs. Elizabeth Ann Herbert? The name Herbert, however, was objectionable, as that name was generally regarded as appropriate peculiarly to males, and accordingly the euphonious name selected for the boy by the learned Dean was Elizabeth Ann Gibraltar.

With a heavy heart Mr. Briggs bowed to a decision which he was unable in any way to resist. It says much for the forbearing disposition of Mrs. Briggs that, despite her own *Positivist* views, she made no demur to the child's being baptized, and, although it was not "her week," she even undertook to superintend the kitchen on the forenoon of the christening, so as to let Mr. Briggs be free for the ceremony. Accordingly, Mr. Stobbs had the satisfaction of admitting the infant Briggs into the bosom of the Church under the engaging name of Elizabeth Ann Gibraltar.

Thus, thanks to Mr. Stobbs and the Dean, this matter was arranged in a manner which compromised the dignity of neither of the parties; but, alas! peace had hardly been restored to the household when another storm broke over the married life of the ill-assorted couple. One day Mr. Briggs, being in a particularly good humour, bought a pair of breeches for Elizabeth Ann, who had hitherto worn an undivided skirt, as has always been customary with children. It so happened that that very day Mrs. Briggs, having won a good stake at pool at her club, and being in the best of spirits,

had bought for the boy a dual skirt, of the kind now universally worn. That evening when the dessert hour came, both parents sat in eager anticipation, each picturing the pride and satisfaction with which the other would view this new departure in the career of Elizabeth Ann. But, alas! although they waited and waited, no Elizabeth Ann appeared. At last nurse was summoned, and was requested to state the reason why, when the only explanation she could give was as follows: "If you please, mum, you sez as how Master Elizabeth Ann were to come down to-night in her new duel dress as you bought to-day; but Master—he sez, sez he, 'Send young Master down to-night in them new pants as I bought to-day; and see as how you don't put them on with the front side behind, now mind;' so I didn't know what to do, mum. Perhaps I ought to have obeyed you, mum, seeing as how you engaged me, but Master Elizabeth Ann is that perverse, for arter him had seen the trousers, him wouldn't put on the duels nohow."

The former difference about the name was trifling in comparison with the disturbance which now ensued. Mr. Briggs, with his usual stubbornness, declared that no son of *his* should go through the world in petticoats. Mrs. Briggs, with quiet firmness, maintained that no son of *hers* should ever stoop to the vulgarity of wearing trousers. It was in vain that Mr. Briggs pointed out that he had practically been obliged to give way in the matter of the name, and that as a consequence he never met a friend upon the street who did not inquire with a significant leer after the health of *Master* Elizabeth Ann. It was all in vain that he insisted that trousers were the only garb suitable for the avocations and the pastimes of manhood. Mrs. Briggs replied that the name question had been fairly settled by arbitration, and therefore that to raise it now was to introduce a totally irrelevant consideration. She had long been convinced that the divided skirt combined the comfort and the convenience of the trousers with the elegance and simplicity of the petticoat, and that it was absurd any longer to make a difference between the garb of the sexes. Trousers had been an offence to her from her earliest years. The garment was essentially vulgar; indeed, so conscious was that very sex which was not ashamed to wear such attire in the light of day, and even in the presence of ladies, of the inherent vulgarity of the garment, that the very word trousers was unmentionable in good society. For her own part, if she had her way, Mr. Briggs would himself discard the objectionable attire; indeed, it was to her a daily source of vexation and regret that she had not stipulated before the marriage that her husband should adopt the divided skirt.

The domestic crisis was aggravated by the extraordinary behaviour of Elizabeth Ann himself, who must undoubtedly have inherited some of his sire's perversity, for the urchin persisted in his refusal to don the dual skirt, and preferred to remain

all day in bed rather than yield compliance to the demand of his mother. Mrs. Briggs, too, had on this occasion the additional vexation of being unable to summon Mrs. Higgins to her help, for that lady had a month or two before accepted the appointment of Secretary to the Japanese Legation.

As Mr. Briggs absolutely refused on this occasion to listen to any suggestions of a reference or compromise, his unhappy wife had no alternative but to call to her aid the strong arm of the law. The Court of Session happened at the time to be in vacation, and accordingly, after consulting her solicitor, she brought a suspension in the Bill Chamber, to have Mr. Briggs interdicted from interfering in any way with the toilette of her child Elizabeth Ann Gibraltar Briggs. But the Lord Ordinary on the Bills, although he passed the Note for the trial of the cause, refused *interim* interdict, and accordingly matters were still left at a dead-lock. Parental affection, however, dictated a temporary remedy. As the child was already threatened with bed-sores, it was agreed that for the present he should be allowed to resume his original garment of an undivided skirt, and with some little persuasion he was induced to do so.

By this time the Court had resumed, and, satisfied that the matter could not be conveniently tried upon a suspension, Mrs. Briggs abandoned that action, and brought an action of declarator and interdict to have her rights clearly and formally determined. In this action she sought to have it found and declared that she was entitled to the sole and exclusive regulation of her own domestic economy, and to have Mr. Briggs interdicted from interfering in any way with the regulation of the same, and, in particular, to have him interpellated from interfering in any way with the upbringing, clothing, or education of her child, Elizabeth Ann Gibraltar Briggs.

The Lord Ordinary (Holm, a male) was so puzzled by the novelty of the action, that, without indicating any opinion, he reported the case to the First Division. There the matter was fully and elaborately argued on both sides by the ablest counsel at the Bar. Counsel for the defender insisted that, although statute and custom had conspired to rob man of supreme authority within his own household, the most advanced advocates of the rights of woman had never ventured to impugn the right of man to equal authority with woman within that sphere. It was further contended that it was altogether incompetent for the Court to regulate the domestic relations of married people living in family with one another. The Dean of Faculty, on behalf of the pursuer, replied that it would be absurd of the Court to refuse to conjugal fidelity the same remedies which it was willing to afford to married people living separate in disregard of their conjugal duty. He proceeded to point out how unworkable any system of joint control within the household was likely to prove, and he

argued that as it was clearly necessary that paramount authority within that sphere should be assigned to one of the spouses, woman was entitled to pre-eminence in what, even in the bad old times, had been regarded as peculiarly her province.

Fortunately, it so happened that at this time the sexes were equally balanced on the bench of the First Division; the Lord President (Goodoldays) and the venerable Lord Klein representing the males, and Lord Corset and Lord Garters the females.

At advising, the conduct of the President was extraordinary. He began by stating that he was aware of the judgment which their Lordships were about to pronounce. He would not dissent from that judgment. He would not pay that judgment the compliment of dissenting from it. He regarded it as not only erroneous but ridiculous, and calculated to bring justice into contempt. The case was from first to last an absurd one. Obviously the parties were very weak-minded, silly people. No reasonable people would name a boy Elizabeth Ann. He would have nothing to do with the discussion of this absurd question which had now arisen between them, and he thought that he would best consult his own dignity by withdrawing from the Bench. On the President's withdrawal, Lord Klein at once took the chair, and after entreating their Lordships in very dignified language to forbear from any angry allusions to the painful incident which had just occurred, and to pass over the remarks which had just fallen from the Head of the Court with that silent contempt which he was ashamed to say they merited, his Lordship called upon Lord Corset to deliver the leading opinion.

Her Lordship proceeded to deliver a most luminous and instructive judgment. She readily disposed of the preliminary objection to the competency of bringing a domestic question of the kind into Court, by pointing out how steadily year by year public opinion and the action of the Legislature had assigned larger powers of inter-conjugal interference to the Court, and then proceeding to show how absurd and impracticable was the suggestion that a line should be drawn at the family threshold. Her Lordship then proceeded exhaustively to review the history of the law of the relations of the sexes as bearing upon the point at issue, and pointed out how step by step a vast revolution had been effected and the just claims of woman to equal rights come to be universally recognised. Now was this principle of equality to be applied within the household? With ample illustration and measured eloquence her Lordship showed how impracticable was the suggestion. To whom then was supreme control to be assigned? The question was a difficult one, and must be very cautiously handled; but upon mature consideration she had come to be very clearly of opinion that the claims of woman ought to prevail, and she would briefly state the reasons (which she might say at once were hardly those advanced by the learned Dean), which had led her to

that result; her Lordship then proceeded to develop the beautiful argument indicated in the preceding portion of this sketch, which finds in the control of the household and family the just compensation due to woman for the burdens incident to the propagation of the species,—burdens in which remorseless nature has assigned no share to man. (Her Lordship spoke with much feeling upon this point, as she was herself expecting her eleventh confinement during the ensuing spring vacation.) Lord Corset was therefore very strongly of the opinion that decree should be pronounced in terms of the conclusions of the summons. Lord Garters concurred in a brief but pointed judgment. Lord Klein, with that garrulity which had grown upon him more and more with advancing years, recapitulated the argument of Lord Corset in a judgment, the delivery of which occupied fully two hours. Some points in his discourse, however, were not without interest, as for example when he alluded to the fact that he himself had often in bygone times had the painful duty of administering a very different law. With shame he must confess it, but he had more than once been constrained to acquiesce in judgments which tore the child of tender years from its mother's arms. (Here the venerable judge was much affected.) But in those days it had been his lot, he ought rather to say his misfortune, to sit beside judges whom—well, of whom he would rather not now speak. In conclusion, his Lordship remarked that his sisters had perhaps followed a wise discretion in refraining from any comments upon the special incidents of this unfortunate domestic dispute. He would not depart from their example further than to say that the conduct of Mrs. Briggs seemed throughout to have been characterized by the utmost forbearance, good sense, and right feeling, attributes of all of which the behaviour of her husband seemed to be sadly destitute. The proposal to discard trousers seemed to him an admirable one, indeed, but for “the indolence of old age” he himself would have no hesitation in adopting the divided skirt. There would be no harm in making the opinion of the Court on this point perfectly clear in the judgment to be pronounced. On the whole matter he concurred very cordially in the judgment proposed by his learned sisters, and as the case was so important, it would be better for the Court to dispose of it finally without remitting it to the Lord Ordinary. The following interlocutor was pronounced:—

“Find and declare that the pursuer is entitled to the sole and exclusive regulation, control, and management of the affairs of her household and family, and specially to the care and charge of the upbringing, clothing, and education of her son, Elizabeth Ann Gibraltar Briggs: Find and declare that the pursuer is entitled to invest her said son in a dual or divided skirt, or in any garment which to her may seem proper; interdict, prohibit, and discharge the defender from interfering or attempting to interfere with the upbringing, clothing, and education of the said child; further

specially interdict, prohibit, and discharge the defender from clothing or attempting to clothe the said child in trousers or in any other similar garment: Find the defender liable to the pursuer in the expenses of this action, the same to be taxed as between agent and client. Remit the pursuer's accounts to the auditor to tax and report, and decern."

Next morning the shattered remains of Mr. Briggs were found beneath the Dean Bridge, which the Town Council of Edinburgh, anxious to leave one last refuge to despair, had resolutely refused to protect with a parapet railing.

THE ORIGIN AND HISTORY OF THE HIGH COURT OF JUSTICIARY.—II.

"JUSTICE suld be done equally," is the title of the last Act in the Assise of King William the Lion, and it may be almost regarded as prophetic of the period of peaceful consolidation and prosperity which marked the long reigns of Alexander II. and Alexander III. "It is statut that justice salbe done communly to all pure men and riche men and principaly to all religiouse and kirkmen and alsua to husband men. And that thai salbe keipit fra all oppressionis and burdinis wyth ye quhilkis thai have bene trublit in tymis bygane, and that na man be herberit (hospitetur) apoun thaim to ye destruction and skaith of thaim and their gudis. And that na erl, baron, nor fre halder or other person travelland thru ye cuntre sall ryde wyth moe personis than he may sustene in mete and drink upon his awne proper expensis." The legislator in conclusion provides that any "brekar of this statut" shall be taken and punished by "ye Schiref of ye cuntre." There is no doubt that during this period, extending from 1214, when William died, to 1286, in which year Alexander III. was killed, much was done to extend the authority of the king's officers in criminal matters. A long peace, lasting something like thirty years, enabled the Justiciars and other criminal judges to administer the laws with less danger of resistance or revolt, and as we shall see the shire courts under the Sheriffs were established in many districts far beyond the bounds of Scotland Proper and Lothian, extending the arm of the law to remote provinces where hitherto reforms had been rather nominal than real.

At the same time we must not forget that in each district on his own lands the authority of the native princeling, chieftain, or feudal baron continued in matters criminal supreme, even to the power of life and death. This may be illustrated by a charter granted somewhere about 1200, by Gilbert, Earl of Stratherne, one of the old Celtic line of Earls, to the Prior and Canons of Inchaffray, whereby he confers upon them the right of judging

in matters of dispute among their own tenants, but carefully reserves his judicial rights "*salva mihi et heredibus meis justitia corporum.*" It will thus be seen that the Royal Justiciars of Scotland and Lothian must have exercised their duties with considerable difficulty in all those parts of the country where large tracts were in the hands of one family, and consequently the easiest remedy for this state of things manifestly was to confer the high office only upon those who, apart from personal qualifications (though possibly in addition to them), possessed estates of such size that when added to the Crown domains their position became strong enough to overawe resistance.

Twice a year, as we know, the Justiciars held their Justice Ayres in the various appointed places in their respective districts, and in the great trial already referred to where Earl Constantine of Fife "*magnus judex in Scocia*" presided, and where he in conjunction with two assessors or arbiters decided a question of boundaries, we gather what may have been another of the duties of the office.

Turning once again to the documentary evidence we still possess, it will be found that amongst the subscribers to various Acts and public deeds, occur persons to whose names a judicial designation is attached, and the same may be said of many of the charters of this period. Thus in 1219, in a perambulation of certain lands belonging to the Monastery of Arbroath and the barony of Kinblethmont, among those subscribing was "*Keraldum fratrem Ade judicis,*" and among those enumerated as present was "*Hugo de Cambrun vicecomes de Forfar;*" but the still close connection between the judicial and personal offices is seen in the presence also of "*Nicholaus braciator regis,*" and "*Adam senescallus de Aberbrothoc.*" Eight years later a formal recognition and confirmation of this "*perambulatio*" took place, it is said, "*presidentibus ex precepto domini regis in plena curia sua apud Forfar Henrico de Baillol (sic) camerario et Henrico de Striuelyn (Stirling) et de Brechyn filiis comitis David, et Thoma Hostiario (Durward), et Johanne de Haya vicecomite de Perth, et Thoma Malherb vicecomite de Forfar,*" whilst among the "*nomina predictorum virorum,*" we find "*Keraldus judex de Anegus (Angus), et Adam judex domini Regis.*" A curious reference to the separate jurisdiction in Galloway occurs in an Act, entitled "*Of ye dome aganis Gillescop,*" which from a narrative of the proceedings in Fordun must have been passed in 1228. The commencement runs thus: "*On ye Sondag nixt eftir ye fest of Sanct Denys at Edinburg in ye chapiter of ye haly croice. It was jugit of Gilespy (Mahohegan) be al ye jugis als wele of Galowa as of Scotland,*" etc. Subsequent reference will be made to these Galloway laws and customs, but notice may be taken of the allusion to Saint Denis, and the reverence paid to him in Scotland at this early date.

The chieftain Gilespic or Gillescoph, against whom the Act was

directed, is one of those shadowy forms that flit across the pages of the history of this century, and seem to hint to us of older races and affinities still then existing, which must have dated back to days before the Saxons had first gained a footing north of the Tweed. From what can be learned, this personage possessed a patronymic variously given as Mahohegan, MacEochagan, and MacSothan, and from this appellation the still well-known Border names of M'Dowall, MacGowan, and others may possibly be derived. Gillescoph was the head of the family of Macwilliam, which had in the previous reign given infinite trouble in Ross-shire and northern Argyll; and in 1221 it is related how this very man and others raised a rebellion "in extremis Scocie finibus." Alexander II. proceeded to Argyll with an army in the following year, and hostages were given and promises made which induced the king to withdraw. This Act, however, six years later directed against Gillescoph, refers to the non-delivery of hostages, and probably arose out of the failure of that chieftain to fulfil his engagements, at least as regards Galloway. The Macwilliams, related as they were to that part of the country in the neighbourhood of Loch Broom, seem nevertheless to have been persons of much consideration in Galloway also, and this most likely may be explained by a consideration of the fact that when the Saxon wedge, to use Mr. Green's expression, was driven through the ancient kingdom of Strathclyde as far as the western coast, and when the Celts of Cantyre and Galloway were cut off from one another on land by their foes pressing them westward, they still kept up communication by sea, and for long recognised tribal and family ties. This was the case in England, where West Wales (Cornwall), long after the severance caused by the battle of Deorham in 577, continued to keep up its connection with South Wales, as also did North Wales with Cumbria, after the conquest of Chester by the Saxons in 613 had for ever divided them as one Celtic people. Gillescoph, in this view, was a dangerous and a powerful obstacle to the establishment of judicial power in all the wilder portions of western Scotland, and his overthrow in Argyll tended to render all the more important the pacification of Galloway, his subsequent abode. What happened to this chieftain and his friends we do not know, beyond the statement that "God gave them over with their abettors into King Alexander's hand; and thus the land was no longer troubled by their lawlessness."

At Stirling, in 1230, William Comyn, "Erle of Buchane and Justice of Scotland," as well as "Walter Olifard, Justice of Louthiane," and Malcolm, Erle of "Fyffe," were present at a Council held by Alexander II. Incidentally the Act then passed refers to the distinctions existing among the lower classes of dependants in relation to the over-lord, for mention is made of "his lege men or kind born bondman or wonnand on his lande or of his fainel" (*homo suus legius aut natus aut in sua terra manens*

aut de familia sua). The family of Comyn is well known in history, and that of Olifard seems to have figured in the front rank under the Celtic kings from the middle of the twelfth century, since the name occurs in 1154 as that of a witness to an Act of Malcolm IV. among the highest nobles in the kingdom. Oppression by the over-lord or by "ony othir man" in the way of depriving persons of their lands, was met by an enactment, in 1230, that the king's "Justice or ye Schireff" should in such case, after taking sufficient security that the complaint would be pressed, make inquiry and, if requisite, restore the land, the offender being, as it is termed, "in misericordia domini Regis."

The references to the Justices of Scotland and Lothian occur in various Acts of this reign besides those already mentioned. Thus at Scone in 1227 we find William Comyn, Earl of Buchan and Justice of Scotland, as a witness immediately after the Chancellor of the Kingdom; and Walter Olifard, the Justice of Lothian, as well as his clerk, witnesses another Act at Roxburgh in 1231, and again "apud Listun" in 1235. Moreover, the fact that these Acts bear to be executed "*consensu atque testimonio*" of the bishops, earls, and barons of the kingdom, "*clero etiam aquiescente et populo*," shows in what light this important judicial office was even then regarded on such occasions of solemnity.

In 1248, the year before his death, Alexander II. "*statut at Streviling befor all thir gret men under wrytten*," an Act "*quod de cetero non fiat sacramentum de amissione vite et membrorum hominis seu terre vel herbe nisi per probos et fideles et libere tenentes per cartas*," and among the witnesses are "Alane Durwart, Justice of Scotlande," and "D. de Grahame, than Justice stedhald- and of Louthiane." This seems to show that the duties of the office had become so important and continuous that, when absence of the Justice or a vacancy rendered it advisable, an acting official was appointed to carry on the business. That the Justice of Lothian had his hands pretty full, is also apparent from an Act passed in 1244: "Of stablyssing of indytmentis," where Alexander legislated, "with ye consal adviz and consentment" of a number of ecclesiastics and barons, including the Bishops of "Sanct Androis and Glasgw," the Abbots of "Kelcow, Dunfermlyn, and Jedwart," the Earls of "Dunbar, Wyntoun, Albermerle, Menteth, Strathern, Buchane, and Mar, Johne ye Balzole, Robert ye Bruys," and others. The object of the Act was to provide against irregular trials, and to secure for each that "throu a lele assyse thai sal passe." This was a great step forward, and the share that the Royal Justiciars had in it is shown by the direction that the "Justice of Loutheane sal tentably and privately mak inquest for til inquiry of ye mysdoaris of ye land and of thair anerdaris (receptatores), and resettowris be ye athis of iij or iiij worthi and leill men, and with ye aith of ye steward of ilk toun of ye schirefdome within his bailzery outane in Galloway, ye quhilk hes special lawys within thaim" (*preterquam in*

Galwydia que leges habet suas speciales). It is well to notice particularly this allusion to Galloway, and its exception from the inquiry to be made by the Justiciar of Lothian, probably still one of the Olifards, because efforts had been made, a good many years previously, to get rid of the "special lawys" of Galloway. This appears evident from a reference to the Assize of King William, where it was laid down that the rights of assize were to be denied to Galloway men, unless they had previously renounced "ye law of Galowa." This decision, it is recorded, was arrived at by "ye jugis of Galowa" at Dumfries, and there is other evidence that these judges of Galloway were the king's judges, for we find them sitting at Lanark on another occasion, a fact which goes far to show that they might rather more properly have been described as judges nominated for Galloway, than as really possessing authority in that still semi-independent region. There is no reference to the king in the decision of these Galloway judges, and it seems possible that all this took place during King William's captivity in England, and that it may have some connection with the violent rebellion which broke out in Galloway in 1174. The king's officers had for some time held the strong places of Galloway, and the rising may have, to some extent, been one of the Celtic population, aided, no doubt, from Ireland and the North, against the Norman barons and the Normanized Saxons, who to a large extent formed the royal party. When, about the year 1000, the British Kingdom of Strathclyde was broken up, Galloway certainly seems to have retained in a measure its independence, though nominally its princes acknowledged the supremacy of the Scottish king; and, as an old proverb, "Out of Scotland into Largs," seems to show, at the outset it extended as far as Ayr Bay, and may be regarded as the remnant of Strathclyde left to its native rulers. Although in process of time it shrunk to the bounds which are at present included under the name through the gradual approach of the Scottish kings, it was still under rulers of its own race, and for purposes of justice was divided into two districts—viz. above and below the water of Cree. For the lower of these districts the principal seat of justice was at the still-existing and remarkable mound called the Mote of Urr. It is not necessary to mention the various semi-legendary chiefs of Galloway whose names occur during the eleventh century, as nothing remains to throw any light upon their administration of justice, though the frequent recurrence of the word "Mote," in local topography, shows that, at least in the lower and southern parts of the two counties, some ideas of what order and justice meant must have already been instilled into the savage tribes. Thus, at Dumfries on the Galloway border, at Kirkcudbright, and at Drummole where some have supposed "Caerbantorigum" once was, the word "Mote" is found, and we may readily believe that the various chiefs administered a rude justice and held tribal gatherings at these places. Fergus,

Lord of Galloway, who lived from 1095 to 1161, went so far as to declare his independence and renounce allegiance to the Scottish Crown; but he was totally crushed in 1160, and retired to Holyrood Abbey, where he died. Nevertheless, although some strongholds were in the hands of the Scots, Galloway really looked to England at this time as her superior, and her chiefs seem to have done homage to the English monarchs, Fergus indeed, it is said, marrying the natural daughter of Henry I. He had two sons, Uchtred, whose name by the way survives in Kirrourchtrie (Caer-Uchtred), and Gilbert, Galloway being divided between them. In 1174 Uchtred was most barbarously murdered by his brother, and the rebellion we have mentioned broke out, with the result of driving all the king's officers out of the province. Uchtred had married a descendant of the great Earl Gospatrick, and he seems to have had a leaning to the Scottish party; whilst Gilbert, at least after the murder, sided rather with the turbulent native races from which he was himself sprung. He died in 1185, and his nephew, Roland, son of Uchtred, after slaying Gilpatrick and Gilcolm, whose Celtic names may be noticed, possessed himself of the principality. Through his wife Roland became Constable of Scotland, though his English connection was still kept up, and it may be said that Galloway from 1186 onwards till the time of Alexander III., was regarded by the English monarchs as a part of their dominions. Roland, Lord of Galloway and Constable of Scotland, died at Northampton in 1199 or 1200, and was succeeded by his son, Alan, who in 1211 is found aiding King John in Ireland; his name, moreover, is actually one of those appended to the Magna Charta. He had ultimately to seek the favour of Alexander II., by whom, on his doing homage for Galloway, he was protected, and made Chancellor of Scotland as well as Constable. This last of the Celtic princes of Galloway died in 1234, and was buried at Dundrennan Abbey in his native province.

Although these lords were high officers of the Crown, and supported in a way the royal authority, yet it seems that in matters of jurisdiction in their own district they retained intact the power of their independent ancestors; and the Irish annals may not be so far wrong in point of fact when they describe Alan and Roland his father as Ri or King of Galloway. No record remains of any Justiciar having ventured into Galloway before the date of Alan's death, and, indeed, the natural obstacles offered by the remote position of the province were, to say the least of it, not diminished by its proximity to the English border, so that the royal officers at Dumfries were between two fires, and continually exposed to raids both from the south and the west. There seems to have been some understanding, however, between those who represented authority on either side the border, for we read in the *Leges Marchiarum* that "The Sheref of Carlile and Drumfres sall answeere at Sulway efter ye lawis and custumys betwix ye two

kinrikis usit." So that probably exchanges of offenders and other matters of business connected with criminal law were adjusted at some point on the shores of the Solway, not far from the present border between England and Scotland. What the special laws of Galloway may have been we are able to conjecture, with reasonable probability of being correct, from certain remarkable chapters occurring at the end of the *Regiam Majestatem*.¹ These chapters in some manuscripts are entitled "Leges inter Brettos et Scotos," and in some measure, no doubt, embody those very "laws of the Scots and Brets" against which, more than half a century later, Edward I. was to direct his "Ordinance." The "Brets" can only mean the Britons, whose name appears in their ancient capital Dunbrettan (Dumbarton), and when the Strathclyde kingdom ceased to exist they still remained, though as a somewhat mixed race, in Galloway, and around its borders preserved with their neighbours the ancient code fixing the compensatory payments to be made for certain offences and injuries,—a code probably in earlier times recognised all over the island, but which by the day of the second Alexander had come to be regarded with disfavour, perhaps owing to the turbulent and not very honest reputation of Galloway men, such as may be gathered from the imputation the use of the name seemed to bear, at least in one instance where an inquiry into a murder was held at Dumfries. The actual incorporation of Galloway into the Scottish kingdom was accomplished apparently by a mixture of conciliation and force. The death of Alan, Lord of Galloway, in 1234, caused a disputed succession, which necessitated interposition by the king, who accordingly, with an army, is found again in Galloway in 1235; but the victory then gained was followed shortly by another rebellion, aided, it is said, by the Irish. The rebels, however, submitted to the royal troops, and as no further resistance to the king's officers is mentioned, it may be presumed that about this time Galloway at least, so far as its rulers were concerned, if not in the administration of justice, became a part of the kingdom. Alexander II. had completed, with one exception, the work begun by his predecessors, and the islands alone remained under the Norwegian sway. Of these the king resolved to possess himself, and accordingly in 1249 he started for the Hebrides, but died at Kerrera, leaving a son, Alexander III., only eight years of age when he succeeded. This event postponed the conquest of the Western Islands, but after the great expedition of Hakon, King of Norway, and the battle of Largs, where his forces were totally defeated, a treaty

¹ It would certainly be dangerous to lay too great stress upon such an authority as the *Regiam Majestatem*, of which the chief value must be found in the fact that it may be credited with at least giving us the reflection of an early system of law; but we seem to have some elements of corroboration with regard to the curious laws which these chapters profess to give us, and the broad principle embraced in them, that of compensation for injury by payments in kind, may be accepted with tolerable safety as having been the basis of the earliest criminal law it is possible to trace.

was made by which Magnus his son, in 1266, ceded to Scotland Man and all the Western Islands, retaining only Orkney and Shetland. These are matters of history, but we have briefly referred to them in order to show clearly the steps towards the consolidation of the kingdom which marked the reigns of the second and third Alexanders. It may be indeed safely said that probably Scotland advanced with greater strides during this period towards complete and homogeneous unity than she did afterwards during any time of like duration until the Union.

The offices of Justiciar in Scotland and in Lothian were practically vested in the great families of Comyn and Olifard (Oliphant); and we have succeeded in tracing a reference to a third Justiciar in the person of John Comyn (Rymer's *Fœdera*), who is described in 1258 as "Justiciar' Galwedix." If we take the Olifard family to illustrate this hereditary Justiciarship, for such it was, there is evidence of their possession of the Lothian office from somewhere about 1150 to the year 1247 at any rate. Thus, soon after 1142, David Olifard, the first of the family who came from England, is described as "Justiciarius Laudonie," whilst his brother Osbert, who appears from an incidental allusion in certain deeds to have held lands called Kirknewton of Arbuthnot, is designed Sheriff and Forester of the Mearns. David's son and grandson became Justiciars of Lothian in succession, and an Olifard is mentioned as holding that office in 1222. In 1223, as "Justiciary of our lord the king," we find him settling a dispute about lands at Stobo in 1226. Alexander II. confirmed to the church of Melrose a grant of certain lands, and Walter Olifard was present; as also in 1228 and in 1229, when the lands of Dunscore in Dumfriesshire were granted to the monks of Melrose. In 1230 this Justiciar attended the King's Council at Stirling, and in 1231 he and his clerk David are at Roxburgh. We read of the measurement of certain land of Saltoun, "as it was measured to me by Sir Walter Olifard, Justiciary of Laudonia," showing what a serious portion of the duties may have been concerned with the civil work of delimitation. In 1235 we find Walter Olifard, "apud Listun," as a witness, and his death and burial at Melrose is recorded in 1242. There does not appear any reference after this to the Olifards as Justices of Lothian, except one in 1247, when William Olifard is so described; but in 1248, Grahame seems at any rate to have been acting as Justiciar. When consideration is given to the fact that the Olifards owned large estates on Tweedside, in the valley of the Clyde, and latterly in Perthshire, we can readily perceive the policy which placed them in so exalted a judicial position. Just on the same principle the Earls of Buchan were Justiciars of Scotland for a long time because the Comyns owned large estates between Forth and Spey. In 1248, however, Alane Durwart is mentioned as Justiciar of Scotland, so that probably their hereditary tenure of the office had

ceased before that date. Besides, Durwart or Durward represented another great territorial house who had carried off through a female much of the domain of the ancient Celtic Earldom of Mar, so there may have been political reasons for the change, and to set off the Durwards against the Comyns was quite in accordance with the policy of Alexander. Beyond this there may have been a desire to check the gradual tendency to heredity in these offices, and a change which removed both the Comyns and the Olifards must have had this effect. In a Council at Stirling, held in 1253, Alexander Comyn, Earl of Buchan and Justiciar of Scotland, is among the witnesses, as well as Grahame, who had previously acted as Justiciar of Lothian; and again we find Comyn as Justiciar in 1255, whilst in the same year he is also mentioned as having been at Roxburgh with the young King Alexander, where the name of Alan Durward (Hostiarius) also occurs, but without designation, so that apparently he had ceased to hold the judicial office. In 1259 is found an inquisition "*in presencia dominorum Thome de Normanvill et Stephani Flandrensis Justic' Laodonie;*" but in 1262 again we have at Inverness a Comyn "*Justiciarius Socie*" in the person of Alexander Cumyn, who appears to have regained the office his family had held for so long. As already mentioned, John Comyn is styled Justiciar of Galloway in 1258, and had probably received or arrogated to himself this office when his family obtained a part of the large possessions of Alan, the last lord. In 1281, "*Williamus de Sulys*" is mentioned as "*tunc Justiciarius Laudoniæ,*" whilst Alexander Comyn in the same Act is styled "*constabularius Socie;*" but he was evidently also Justiciar then and subsequently, since both titles are given him in an Act of 1283, in which William de Soulys is also named, though "*tunc Justic.*" is again the form.

Reviewing shortly the progress made during the reigns of Alexander II. and Alexander III. towards a regular system of criminal law and a fixed judicial establishment, we see that the office of Justiciar was one of importance, alike in its duties and in the class of persons by whom it was held. Alexander II. in the foundation charter of the Cistercian Abbey of Balmurinach (Balmerino), addresses the bishops, abbots, earls, barons, sheriffs (as earl's deputies) and Justiciars of Scotland, including apparently the latter, because by them questions of delimitation might have to be determined, incongruous as this duty might seem with our modern notions. The Justiciars also now appear attended sometimes by their clerks, and especially there may be noticed here an *Inquisitio de terra de Polnegulan*, said to have taken place "*apud Dumbretan*" in 1259, "*in presencia Andree clerici, attornati, Justiciarii, constituti per literas regis et in presencia Roberti de Colechon (Colquhoun?), et aliorum proborum de Leuenax (Lennox)*"—where Andrew the clerk seems to have had a formal

mandate to represent the higher officer, and to have acted upon it among the magnates of the district concerned.

When we find during these reigns not only well-known central towns in Lothian and Scotland proper receiving due administration of justice through Shire Courts, but also remote places hitherto unknown in judicial annals, this fact alone suffices to show the degree to which a Criminal Court however rudimentary had developed. Not only was the Justiciar himself moving about in his circuits, but a Shire Court was open for the redress of grievances and punishment of offenders in such hitherto remote places as Inverness, Elgin, Dumbarton, and Dumfries. The last, as we have seen, was on the confines of a most turbulent province: Dumbarton, yet very Celtic, had been the capital of the Strathclyde kingdom, and memories of a great past yet lingered around the rock: Inverness could not have forgotten the risings of the Macwilliams, nor Elgin the mighty race of Celtic Mormaers of Moray: yet during these two reigns all accepted the new order of things, and in so doing gave Scotland that cohesion which alone enabled her as a nation to withstand successfully the wars of succession and the arms of the English invader.

(*To be continued.*)

NOTES IN THE INNER HOUSE.

THE case of *Lord Lovat v. Fraser* (July 18, 1884, First Division) is not without an historical interest, and if parties were ever to get the length of proving their respective pedigrees, there will doubtless be added to the romance of the peerage a very readable chapter. But as yet, only a somewhat dry question of law has been settled, and settled in such a way as to render any inquiry into the facts in dispute quite unnecessary. The parties to this action, which originated in competing petitions before the Sheriff of Chancery were Simon, Lord Lovat, whose father's claim to represent the ancient barons of Beaufort was recognised by the House of Lords in 1857, and John Fraser of Mount Pleasant Villa, Carnarvon. The ground over which this preliminary battle has been fought, consists of the comparatively small estate of Abertarff, Inverness-shire, the succession to which has recently opened by the death of Archibald Thomas Frederick Fraser of Abertarff. But if Mr. Fraser of Carnarvon is right in his contention, he is, we believe, entitled to claim the whole entailed estates of Lovat, and the ancient Scottish peerage, created more than four centuries ago. Hence the question which is now raised is likely to be keenly fought. According to Mr. Fraser, one well-known character in Scottish history has played a leading part in a real drama of much interest under an assumed name. Simon Fraser.

immortalized by Hogarth, plotted and schemed, was arrested, tried, condemned, and executed as the Lord Lovat of the day. For his sins the peerage was forfeited and the family disgraced. But this Welsh member of the clan now reduces the celebrated Simon to the position of a younger brother. The father of Simon had another and elder son Alexander. Alexander had also a romantic career, although one which did not, like his brothers, introduce him to the page of history. Having slain an offending piper in Inverness, he was obliged to take refuge in the wilds of Wales; and hence, it is said, the explanation of this Welsh branch of the family. To still further understand the present position of matters, it is necessary to go back to Alexander, the sixth Lord Lovat, and descendant of Hugh, Lord Lovat. This Alexander had two sons, Hugh and Thomas, the latter being known as Thomas of Strichen. Now the descendants of Hugh carried on the family until the crash came which followed the treason of the celebrated Simon. If Simon had not an elder brother leaving issue, his descendants would, of course, represent the family. Apparently, the last of them was Archibald Fraser, his son, born in 1736, and who died so lately as 1815. If the line of Hugh, the son of Thomas, was extinguished by his death, as he himself recognised that it would be, then obviously the Frasers of Strichen were next in succession, being the representatives of Hugh's only brother Thomas, descended of course from the common ancestor Hugh Fraser. Archibald recognised the Frasers of Strichen, and he entailed his estate of Abertarff first upon the illegitimate son of a predeceasing son, and then upon Mr. Fraser of Strichen, whom he at once named and described as the "nearest legitimate male issue of my ancestor Hugh, Lord Fraser of Lovat." This was unquestionably the true description of Fraser of Strichen's position in the clan, provided that the Beaufort line was extinct with the entailer of Abertarff. But, says Mr. Fraser of Carnarvon, the line of Beaufort was not extinct with Archibald; in fact, it had never been truly represented by him. For there were all along these cousins in Wales, the descendants of the expatriated Alexander. As Archibald had acquired the estate of Abertarff in fee simple, he was of course entitled to entail it upon any person whom it pleased him to call to the succession. But who was the party named? He was "the nearest legitimate male issue," the description came first, the name of the party answering, in the opinion of the entailer, that description followed: If, therefore, Fraser of Strichen was not the nearest—if he was excluded by the Welsh descendants of the Beaufort family—then the present Lord Lovat, who represents the Fraser of Strichen, has no claim to the estate of Abertarff. This was in substance the argument of Mr. Fraser of Mount Pleasant Villa. How have the Court of Session dealt with it? The judges have assumed that both parties have established their pedigrees, or at least can easily establish them;

hence they assumed that Mr. Fraser truly represents the Beaufort family as the descendant of Alexander, Simon's elder brother, and consequently was, in point of fact, "the nearest legitimate male issue of my ancestor Hugh, Lord Fraser of Lovat," holding a position erroneously given to Fraser of Strichen in the deed which contained the above words. But assuming all this, they nevertheless refused to recognise Mr. Fraser as the heir of entail of Abertarff, because they could not get over the entailer's manifest intentions to give his lands to Fraser of Strichen—the party whom he rightly or wrongly recognised as his nearest heir. Hence, as far as it has gone, this case has only disposed of a question of *falsa demonstratio* or *falsa causa*, but an obstacle has been placed in the way of Mr. Fraser's further progress, which he will find it rather difficult to remove. The precise words in the deed of entail, which gave rise to this controversy before the First Division, were as follows: "To and in favour of the nearest legitimate male issue of my ancestor Hugh, Lord Fraser of Lovat—namely, Thomas Alexander Fraser of Strichen." The question, of course, was just this: To what portion of this sentence was the greatest importance to be attached? It might fairly be argued that with all the pride of race which characterize a Highlander, the entailer would desire that the chief of the clan should possess the estates; and that if Fraser of Strichen could not rightly claim that position, he was not the man for whom the land was really destined. But, on the other hand, in order to give such a construction to the deed, it was necessary to supply words which were not there. "I think," said Lord Shand, "the petitioner, John Fraser, must have succeeded in his contention that he has a right to this estate, on the assumption that he can prove his pedigree; if, on the one hand, the destination had simply been to the 'nearest legitimate male issue of my ancestor Hugh, Lord Fraser of Lovat,' without going on to designate the particular person whom the entailer had in view; or if, assuming that instead of the name being used as it is used, it had been used subject to the explanation that the succession was made conditional, if the same had been followed up by some such words as these, 'provided the said Thomas Alexander Fraser of Strichen be the nearest legitimate male issue of my ancestor.'" But as the deed was worded, the judges were quite at one in the view that it was effectual as a conveyance of the estates to the Strichen branch. "It may be said," remarked the Lord President, "that the inductive clause was a mistake. Now then again I apprehend it is settled that that does not affect a destination or a conveyance to a person named; there being no doubt about the identity of the person, *falsa causa* has just as little effect in a case of this kind as *falsa demonstratio*." Mr. Fraser seems to have relied upon only two Scotch cases in the course of his argument—one of these was *Clark v. Scott*, 5 Sh. 109, when a proof was allowed to the defender, because a charter contained more than one descrip-

tion of the property conveyed, and these descriptions were said to be contradictory. But to have made that decision an authority, there should have been some ambiguity in the expression used by the entailor. There was none, the heir of entail was distinctly named, and there was no doubt as to what was meant by the "nearest legitimate male issue." The same remark applies to the other case cited—viz. that of *Davidson v. Magistrates of Anstruther*, 7 D. 342.

The case of *Sinclair v. Fraser* (July 19, 1884, Second Division) raised the question of the power which the Court of Session can exercise over the proceedings of arbiters, and led to a difference of opinion amongst the judges of the Second Division.

Two arbiters, who had been appointed to value certain subjects for an outgoing and an incoming tenant, differed in opinion—one of them desired further evidence as to the value of a particular subject, the other was prepared to dispense with evidence. Hence there was a dead-lock. The outgoing tenant brought an action in the Sheriff Court of Inverness, in which he called one of the arbiters as a defender, and sought to compel him either to concur with the other arbiter, or join with him in devolving the submission on an oversman. The Sheriff-Substitute having had an interview with the arbiters, found that the difference of opinion between them was such as to call for the intervention of the oversman, and appointed them to exercise a devolution in his favour. The Sheriff, however, dismissed the action, holding that it was unnecessary, as the submission had devolved upon the oversman by the fact of the arbiters being unable to agree. In the Court of Session, the majority of the judges took the view adopted by the Sheriff-Substitute. Lord Craighill said: "I think it was of the highest expediency that there should be a devolution, because otherwise there was prevented any certainty as to whether the duties of the arbiters had been devolved." Upon the suggestion of Lord Young, a question of competency was raised at the Bar: Was such a case properly brought in an inferior Court? Lord Craighill, while admitting that there was no precedent in the Sheriff Court, held that what the Sheriff-Substitute had done was quite competent. Lord Young said: "It occurred to me to be a grave question of jurisdiction, whether when two arbiters took up the position that the Sheriff-Substitute has recorded as the result of his interview with these gentlemen, the Sheriff-Substitute can be called in to adjudicate between them as to which is right, or what ought to be done. I think it is a very delicate matter involving what we have been accustomed to speak of as *nobile officium*. If there is a hitch, or a lock which prevents further procedure in such circumstances, I do not think it is a magistrate that is to be called in to relieve the parties of any difficulty. I think an appeal must be made to, and an order may be made by, the Supreme Court." The Court was unanimous in

holding that one arbiter could not be compelled to concur with another.

We note two cases relating to the Companies Act. In *Stephen, Petitioner* (July 18, 1884, First Division), the creditors of a banking company, under a deposit receipt for £100, brought an action for payment. This claim was resisted by the bank upon the ground that the money was to remain for one year. This ground of defence was, however, departed from, and the action lasted until a certain day upon which it was understood the pursuer was to be paid. That day having come without payment being made, decree went against the defenders in the Outer House. The creditors then presented a petition for the winding up of the company, founding upon sec. 79, sub-sections 4 and 5 of the Act of 1862. The company maintained that they were still carrying on business, and that they had reclaimed against the Lord Ordinary's judgment. But the Court, holding that the defence was a mere sham from the beginning, made a winding-up order, and appointed an official liquidator.

In *Sanderson v. Muirhead and Others* (July 18, 1884, First Division), the Court appointed as liquidator of a hydropathic company one of the directors, in respect of his acquaintance with the working of the establishment. In opposition to his appointment, it was urged that the English Courts held that a shareholder ought not to be a liquidator.

STATUTES AFFECTING SCOTLAND.

SCOTLAND has been very little affected by the session of Parliament recently terminated. Certain most important bills were introduced, such as the Secretary of State Bill, and the Burgh Police Bill. They were partially discussed, and then thrown aside along with many others. We may, however, note three Acts which fall under our title.

Chapter 16 extends certain provisions of the Bankruptcy Act of 1883 to Scotland. It comes into operation upon the last day of the present year. A new offence under the Scottish Act of 1880 is created. An undischarged bankrupt (including an insolvent under cessio proceedings) who obtains credit to the extent of £20, without informing the party giving it to him of his financial position, may be criminally dealt with. Until the decree of cessio or sequestration has been recalled, or a discharge obtained, no undischarged bankrupt can act in any municipal capacity, nor be a member of parochial, school, or road board, nor form one of the local authority under any Act. A Scottish member of the House of Commons loses his seat if he remain bankrupt for the period of six months from the date of the decree of sequestration or of cessio, nor can a bankrupt be elected as a

Scottish peer. Any one holding a municipal or other office, from which bankrupts are excluded, at the date of his sequestration, ceases to retain such office.

By Chapter 34 the hours of polling in burghs of more than three thousand electors have been extended. This Act applies to both Parliamentary and municipal elections. The hours henceforth are to be from eight in the morning until eight o'clock in the evening.

The Act to amend the Sheriff Court-houses Act of 1860 (c. 42), although it excited while in the bill stage some discussion in various counties, passed without serious opposition. The important provisions are contained in sections 5 and 6. Under the law as it previously stood the Treasury were liable in one-half of the expense incurred in erecting or improving any Court-house. It is now provided that the Treasury liability is to be regulated by the *estimated* expense, and that any excess is to be recovered from the county rates. Again, the amount to be expended out of public money in repairing, building, cleaning and lighting them, or upon the wages of officers connected with them, is to be regulated by the average outlay of the last three years, in the case of each particular Court-house. But it is obvious that this provision, did it stand alone, might operate unfairly in some counties. Buildings upon which little has been expended for years past are probably the very places now calling for extensive repairs. But in certain cases an excess of expenditure over the average may be allowed under the special sanction of the Commissioners of the Treasury. Under section 8, the liability to erect buildings destroyed by fire rests with the Commissioners of Supply.

POLLUTION OF UNDERGROUND WATER BY PERCOLATION.

THE case of *Ballard v. Tomlinson* (50 L. T. Rep. N. S. 230; 26 Ch. Div. 194) raises and leaves in a somewhat unsatisfactory condition the law as to rights arising in connection with underground percolation of water. It is within our knowledge that some ten years ago, on an almost identical state of facts, diametrically opposite opinions were given by two eminent counsel, one of whom now sits on the bench. By the class of cases of which *Chasemore v. Richards* (7 H. of L. Cas. 349) is the most prominent example, it is definitely ruled that a proprietor of land may abstract the underground supply of water, which has hitherto fed the well of an adjoining proprietor, where such underground water flows in no known and defined channel. Where, however, the course of a subterranean stream is well known and defined, it has been

supposed (as in *Dudden v. Clutton Union*, 1 H. and N. 630, and *Wood v. Waud*, 3 Ex. Rep. 748) that the rights of a person damaged by abstraction of water are the same as if the stream were wholly above ground. We may be permitted to suggest that, with the progress of science, the number of cases falling under this exception or sub-rule may be possibly capable of increase. But where a wrong is alleged to have arisen, not from abstraction, but from pollution of underground water by percolation, there is a "competition of opposite analogies," and some hesitation has been shown whether to rest the decision of such a question on the principle enunciated in *Chasemore v. Richards*, or on the principle of another class of cases under which *Rylands v. Fletcher* (19 L. T. Rep. N. S. 220) is most frequently quoted. How far, in other words, is the person who on his own land pollutes underground water subject to the quaint maxim in *Tenant v. Goldwin* (1 Salk. 360), "He whose dirt it is must keep it that it may not trespass"?

In *Ballard v. Tomlinson*, Mr. Justice Pearson found on the facts before him that the plaintiff had "no greater right to the quality of the water than to the quantity." This may have been true as applied to the facts of the case, but as a general proposition it appears to us to err by confounding what we will term the principles of abstraction and of pollution. It is submitted that the whole tenor of the cases on abstraction goes to rest the rule of law on the practical impossibility of proof of subtraction as the result of the acts of any one particular person. It is a very different matter with pollution. Whether it is I, or some one ten or forty miles off, or even nature herself, who is principally concerned in withdrawing the water which would otherwise come to you, is a question which, in the vast majority of cases, cannot be perfectly determined. The opinion of experts, however *bona fide*, may easily be erroneous. But whether it is I, or some one else, who is instilling noisome matter into your hitherto pure well may often admit of clear proof. Mr. Justice Pearson saw his way to distinguish *Womersley v. Church* (17 L. T. 190), before Lord Romilly, on the grounds that (1) in that case there was no suction by pumping on the part of the plaintiff to bring the noxious matter on to plaintiff's land as there was in *Ballard v. Tomlinson*; and (2) the percolation was there direct and lateral from one well to the other, the wells being only fourteen yards distant, while in the latter case they were ninety-nine yards apart, and separated by a highway; and, moreover, the case made by the pleadings seems to have been that the percolation took place through a *res communis*—viz. the subjacent water in the London chalk basin. Furthermore, the only experiment to show connection between the wells as reported was perhaps not conclusive. Chloride of lithium was put into the defendant's well, and two or three days later "traces of lithium" were found in the plaintiff's well. Subject to correction by better chemists than ourselves, we should say that "traces of lithium" would be

liable to be detected by the spectroscope in almost any well or spring water. As to the question of pumping, it seems to make a difference only of degree. If a man is entitled to pure water in his well when he lifts it out with a bucket, it may be thought that he does not lose the right because he employs a reasonable amount of suction by pumping.

The real points at issue seem to be these: Is it *damnum absque injuria* to pollute the water in another's well by underground percolation? Secondly, if this does amount to *injuria*, does it make any difference in law that the percolation is indirect and through the medium of a *res communis*? Were the whole occurrence overground, the passage through or over a *res communis* would make no difference, and the defendant would be liable for a nuisance. It is submitted that if the passage of noisome matter occurs below ground, and by way of percolation, the sole difference caused by the interposition of a *res communis* is a difference of fact, inasmuch as it increases the difficulty of proving the identity of the objectionable matter alleged to have passed from the defendant's to the plaintiff's land. In *Hodgkinson v. Ennor* (4 B. & S. 229), quoted and adopted in *Gale on Easements* (5th edit. p. 296), it is said that, "Although a man is not bound to prevent water percolating through his land from coming to his neighbour, or may drain the water from his neighbour's land, he cannot foul the water percolating from his neighbour's land to his neighbour's injury." So in America, *Angell on Watercourses* (p. 183), after laying down the principle of *Chasemore v. Richards*, continues: "The case of a man fouling . . . waters which percolate from his lands to those of his neighbour has been supposed to be clearly distinguishable, and to depend on different principles;" and he refers to *Frazier v. Brown* (12 Ohio St. 294) and *Chatfield v. Wilson* (28 Vt. 49) as authorities to show that under these circumstances an action would lie. We conclude that *Ballard v. Tomlinson* stands alone, if and so far as it enunciates as a general proposition that a man has "no greater right to the quality of the water than to the quantity." The case is in the list of appeals. When it is reached it will be a matter for regret if it goes off on minor issues of fact, without a clear defining of general principles.

Possibly further legislation on this subject may be needed. In the meantime, the following propositions are submitted, as approximately stating the balance of opinion on the law as it now stands: (1) There is no right of action against one who, by acts otherwise lawful on his own land, prevents water from flowing into the well of his neighbour. (2) Nor against one who similarly abstracts water already lying in a defined basin or space under such land. (3) Nor against one who fails to prevent water on his land from percolating through his land and coming to his neighbour's land to such neighbour's detriment. (4) But an action lies against one who fouls water on his own land which he afterwards permits to

percolate therefrom to his neighbour's land, and thereby to pollute his neighbour's well. (5) *Seemle*, it makes no difference in point of law whether such polluted water percolate directly from the land of the defendant to that of the plaintiff, or indirectly by passing through other private property, or through a *res communis*. But whether such passage by percolation takes place or not, is in any case a question of fact, the burden of proof being strictly on the plaintiff.

We put (5) doubtfully. Yet it is rarely a question of great public importance in these days of sanitation how far (apart from local or other special statutes) a man has the legal right of concentrating sewage in a bottomless well to poison the common water supply of a district, and then to plead non-liability for underground percolation to an information, indictment, or action for nuisance.—*Law Times*.

TALES FROM THE LAW.—“ROGER I.”

THERE can, it is opined, be very little doubt that all men would be baronets of ancient family, with rent-rolls of £20,000 a year, if they could. But there are few, indeed, even of the most desperately adventurous, whom this natural ambition would impel to the attempt to force the hand of fortune by laying a false claim to the name and estates of another, and supporting it by the most glaring perjury, forgery, and corruption, down to the stage of a formal trial at law. The story of the notorious case of *Smyth v. Smyth* is interesting, not only as showing that bold claimants lived before Tichborne, *alias* Orton, *alias* Castro, but as exhibiting several points of wonderful similarity to those which cropped up in the course of the proceedings in the old Court of Common Pleas.

In the first year of the present century there died, in Gloucestershire, Mr. Thomas Smyth of Stapleton, a gentleman of high lineage, and large landed property in the counties of Somerset and Wilts. He left issue—(1) Hugh (afterwards Sir Hugh) Smyth. (2) John (afterwards Sir John) Smyth, and (3) two daughters, one subsequently married to John Upton, Esq., and the other to Colonel Way. By his will he had devised the Stapleton estate to his second son, John, for life, with remainder to his issue in fee, and in default of such issue, to his eldest son Hugh in fee. In default of issue of Hugh, the estate went to the daughters above mentioned in fee; and both Sir John and Sir Hugh Smyth having died childless, it was, in fact, by the son of one of the daughters of Thomas Smyth that the property was held at the time it entered the head of “Sir Richard Hugh Smyth,” otherwise “Dr. Smith,” otherwise “Thomas Provis,” to lay claim to it, alleging that he was the legitimate son of Sir Hugh Smyth, and accord-

ingly entitled to the exclusion of Thomas Smyth's grandson by his daughter. Both parties to the action which ultimately frustrated the designs of the would-be baronet “founded,” it will be seen, upon the same will, and the only question in dispute was whether Sir Hugh Smyth, the elder son of Thomas Smyth of Stapleton, had left issue. Now, Sir Hugh had been twice married, first to a Miss Wilson, by whom it was admitted on both sides that he had no issue; and, secondly, to a Miss Howell, by whom it was also admitted that he had no family. The claimant, therefore, could not possibly make out his title as his heir-at-law by either of these marriages; but his case was, that Sir Hugh had been thrice wedded, and that, previously to the marriages alluded to, he had been united in Ireland to a Miss Jane Vandenberg. This marriage, and the subsequent birth of himself, was what “Sir Richard,” with a laborious ingenuity worthy of a better cause, set himself to prove as plaintiff in ejectment.

His history, according to his own showing, was just as strange and romantic as that of James Annesley, Charles Reade's *Wandering Heir*, or of the “unfortunate nobleman” himself. Sir Hugh Smyth—this was the tale—was first married in Ireland in 1796. In consequence of the position in which he was placed, his father being desirous of his espousing Miss Wilson, a daughter of the Bishop of Bristol, he kept this marriage a secret; but that it had taken place was an undoubted fact, the 19th of May 1796 being given as the date, and the private residence of the Earl of Bandon, at Lismore, as the place, whilst the bride, Miss Jane Vandenberg, was stated to have been the daughter of a mysterious Count Vandenberg, and at the time acting in the capacity of companion to Mrs. Bernard, afterwards Countess of Bandon. The rebellion was then just breaking out in Ireland, and the Countess, the Marchioness of Bath, and Lady Jane Smyth came over to England and took up their abode at No. 1 Royal Crescent, Bath. In January 1797, Lady Jane was confined of a child in the house of a carpenter named Provis, at Warminster, where she had been sent for the purpose. She was attended in her confinement by a woman named Lydia Reed, but unfortunately died soon after her son was born, and the child was left in Reed's care. A register of the marriage existed, but it was admitted not to be in the form usually followed in England; the explanation of this being, that in Ireland at that time marriages did not generally take place in churches, but all persons, of any condition in life, were married in private houses. The entry of Sir Hugh Smyth's marriage to Miss Vandenberg was made in a family Bible, and signed by the officiating minister, the Rev. Mr. Lovett, of Lismore, Sir Hugh himself, and other witnesses. In the same Bible, also apparently duly signed and attested, was a register of the baptism of the child at Royal Crescent, Bath, by the Rev. Mr. Symes.

A few months after the death of the alleged Lady Jane Smyth,

Sir Hugh married Miss Wilson, and still wishing to keep his first marriage a secret, left the little claimant at Provis's until he was sent to school. It may be observed that in support of this part of his case “Sir Richard,” in addition to the family Bible, produced a letter stated to have been written by Sir Hugh Smyth to his wife just before her confinement at Bath, and a witness in the person of a niece of Lydia Reed, who “nursed him as a child,” and pointed out also two identifying birth-marks which he possessed, one a curious laceration of the wrist, and the other a remarkable turning back of the thumbs, an hereditary peculiarity in the Smyth family. The thumb episode was by a most singular coincidence reproduced in the Tichborne case.

After the claimant's childhood he was sent, he averred, to Lowe Court, and thence to the school of a Mr. Hill, of Brislington, where he was known as Richard Hugh Smyth. He was next transferred in the same name to Warminster School, where he was “educated as a gentleman,” and visited by the Marchioness of Bath, and other persons of distinction, more or less connected with his father and mother. Finally he went to Winchester, and whilst there the payment of his schooling was entrusted to a man of the name of Grace, Sir Hugh Smyth's butler, who, it was insinuated, in 1814, for his own purposes, reported the boy to be dead. Sir Hugh at first believed the story, but afterwards appears to have entertained suspicions of its truth, and in 1822, having become impressed with the idea that his son was still living, and being seriously ill, executed a deed (found amongst the papers of Lydia Reed) which declared that the claimant, if he ever turned up again, was entitled to his estates. The latter's own account of his disappearance in 1814 was that he had been sent abroad that year by the Marchioness of Bath for the benefit of his health.

Pausing to remark that the signatures of Sir Hugh and the attesting witnesses to this deed, and to another to the same effect, executed in 1823, were admitted by the claimant and his friends to be somewhat difficult of recognition, and that they both contained such gems of orthography as “rascallity,” “sett aside,” etc., besides several gross solecisms of grammar and style, we proceed with “Sir Richard's” narrative. From 1814 to 1826, he was on the Continent with a “Lord Knox,” acquiring various accomplishments, which he utilized on his return to England by giving lectures under the name of “Doctor Smith.” He had always thought he was the son of Sir Hugh, but being aware that his appearance would give a good deal of offence to his father's connections, had abstained from prosecuting his claim. In 1826, however, he discovered that his father was dead, and that Sir John Smyth was in possession of the estates. Still he took no active steps, though his notions as to his own rights kept increasing in strength, and the case lay dormant till 1849, when he went to

Sir John and had an extraordinary interview with him, which ended in his being acknowledged as the son of Sir Hugh, and caused Sir John's death on the same night. This interview took place at Ashton Court, and at the trial the claimant swore that Sir John's younger sister, Mrs. Way, did all she could to prevent it; but that he persevered, and at last induced the baronet, who was “fearfully agitated,” to recognise him, and give him the sum of £50. “He offered me,” said the affectionate nephew, “a draft for more; but I did not take it—I wish I had.” From 1849 to 1851 he occupied himself with lecturing, teaching, and looking out for a solicitor to take up his case. He found this last task a very difficult one, but he ultimately obtained the services of a limb of the law willing to speculate in him, and at the mature age of fifty-six brought an action to recover the estates of his ancestors, which came on for trial before Mr. Justice Coleridge, at the Gloucester Summer Assizes, in 1853. A remarkably strong Bar was engaged on either side, Sir Fitzroy Kelly, Q.C., Mr. Keating, Q.C., Mr. Bovill, Mr. Phipson, and Mr. Dowdeswell appearing for the plaintiff, and Sir Frederick Thesiger, Q.C., Mr. Crowder, Q.C., Mr. Alexander, Q.C., Mr. Gray, Mr. Skinner, and Mr. Taprell for the defendant. The first two days of the trial were almost wholly occupied in putting in and endeavouring to prove the documentary evidence adduced by the plaintiff, consisting of (1) the letter supposed to have been written by Sir Hugh Smyth to his wife just before her confinement; (2) the two instruments made by him acknowledging the plaintiff; and (3) the Bible, containing the entry of the marriage at issue, and the certificate of the baptism at Bath. *Prima facie* all these seemed authentic, and the evidence of the witnesses who spoke as to the genuineness of the attesting signatures was on the whole not unfavourable, though John Symes, who was called to prove the handwriting of his father, the Rev. James Symes, in the Bible, was fain to confess in cross-examination that “he had been in the workhouse for eleven or twelve years. A Mrs. Mattick came and took him out. She said it would be a good day for him if he could come and prove his father's signature. It might be £50 a year to him.” The cross-examination of the Hon. Captain Bernard also, who was produced to give evidence of the circumstances of the Irish marriage, was, to an expert ear, most ominous; but as in the Tichborne case, the real break-down came when the defendant's counsel rose to “smash, destroy, and pulverise” the testimony of the plaintiff. In his examination in chief, “Sir Richard” had told his story as we have given it above, and had also produced some jewellery which he said had been his mother's and had been given him by old Provis. This consisted of a miniature portrait, four gold rings, and two brooches. One of the rings was marked with the initials “J. B.,” suggested to be those of Jane Bernard, and on one of the brooches appeared the words “Jane Gookin”

at length. In the hands of perhaps the ablest cross-examiner of that time, however, the claimant was compelled to give a number of answers of the “*Non mi ricordo*” sort. His mind seemed to be a perfect blank with regard to the details of his school and early life, and again, “just like Roger,” when asked to justify such spelling as “visicitudes,” “Lord Nox,” “rappid,” “whome,” and so forth, made matters worse by insisting that he could adduce abundant authority from “learned commentators” for his versions. He also got considerably confused over the motto of the Carringtons, which he gave as “*Tenax et fides*,” instead of “*Tenax et fidelis*,” and that of the Smyths themselves, which, according to him, was “*Qui capit capitor*,” instead of “*Qui capit capitur*.” At last the bolt fell. After several searching questions on the subject of the ring and brooch engraved “J. B.” and “Jane Gookin,” Sir Frederick Thesiger produced a telegram, and addressing the judge amidst dead silence, said, “My lord, I have just had a telegraphic message from London of the greatest importance. Did you (to the plaintiff) on the 19th of January last apply to a person at 361 Oxford Street to engrave the ring with the Bandon crest, and the brooch with the words Jane Gookin?” The witness lost his head, and replied simply, “I did, sir.” The excitement in court at this unexpected avowal was intense. Sir Frederick sat down, and was so much affected as to be quite unable to proceed, or even to repeat the question. Mr. Bovill, upon whom, owing to the absence of Sir Fitzroy Kelly and Mr. Keating, the whole burden of the conduct of the plaintiff’s case had fallen, was also deeply moved. At the request of the judge, Mr. Alexander repeated the question, and the ring and the brooch were produced and admitted by the plaintiff to be the ones referred to. Hitherto he had boldly faced all questions, but was now evidently beaten; and when he had been asked whether he had not been suffering eighteen months’ imprisonment for horse-stealing under the name of Thomas Provis, during the time he had alleged that he had been lying ill in the house of a Dr. Williams, and had given only a feeble denial, and had, moreover, confessed that his identifying birth-mark was the result of the king’s evil, Mr. Justice Coleridge thought it time to inquire of his counsel whether he intended to go on. The appeal was answered by Mr. Bovill throwing up his brief. The jury found for the defendant, all documents and jewellery were impounded, and the plaintiff was taken before a magistrate and committed for trial on a charge of forgery, of which crime he was found guilty at the next assizes, and sentenced to twenty years’ transportation. On the second trial it was conclusively proved that he was Thomas Provis.

The true history of the inception of such frauds as those attempted to be perpetrated by Provis and Orton is, it may safely be said, never revealed in all its details. With regard to the case we have been treating, the truth might possibly be that old Provis

and Lydia Reed, having had the custody of an illegitimate son of Sir Hugh Smyth's confided to them, and being, to a certain extent, acquainted with the antecedents and connections of his family, endeavoured to utilize their secret and the knowledge which they possessed, by inducing Thomas to come forward as that son, and lay claim to Stapleton. A kind of syndicate might then have been formed, and the Provises, the Reeds, and their ally, finding that they were not "bought off," as they, no doubt, expected and wished to be, resolved to brave the matter out, and try to bolster up clumsy perjury with equally clumsy forgery. Thomas Provis must have been in a desperate position to have undertaken the chief risk, a risk of which he was no doubt thoroughly aware, as a man of ability and astuteness. He conducted his own defence on his trial for forgery with great skill and resolution, and a retort which he made in the civil proceedings is deserving of record. Sir Frederick Thesiger had asked him how it was that he knew that tartaric acid would bring out writing on a document. "By reading, as you ought to do," was the reply. "Ay," said Sir Frederick, "but I do not want to bring out writing." "But you bring out other things," retorted Provis, "and with considerable acidity."—*Pump Court*.

Reviews.

Vico. By ROBERT FLINT, Professor in the University of Edinburgh, Corresponding Member of the Institute of France, etc. Edinburgh: Blackwood. 1884.

THIS volume of "Blackwood's Philosophical Classics for English Readers" is worthy alike of the excellent series of works to which it belongs, and of the distinguished theologian whose name adorns its title-page. The main design of its production is to enrich the literature of mental science, and it cannot but be regarded as a valuable contribution both to the history of philosophy and to the philosophy of history. It is, however, in neither of these aspects that it is entitled to notice in these pages, but because it deals largely, and in many respects profoundly, with the science of jurisprudence. Vico, the subject of Professor Flint's monograph, arrived at his philosophy of history through and by a philosophy of law which coincides remarkably in many particulars with that which has commanded the adherence of the most enlightened jurists of Scotland, and one of the most important results to be expected from the appearance of this work is a more intelligent and more general appreciation of the principles of scientific jurisprudence, and of this long-neglected Italian philosopher whose labours have done so much to elucidate and confirm them.

The neglect with which Vico has met at the hands of those whose doctrines he anticipated will no longer be attributable to the circumstances which have at least excused it in the past—the arbitrary nature of his method and the obscurity of his exposition. Self-taught and thinking independently, Vico produced a body of doctrine the very originality of which made it unique in its time; and as if this were not enough to debar it from popular diffusion, he must needs couch it in a style so obscure, so intricate, and so hampered by unobvious examples, that the study of his work must perforce be preceded by a labour of interpretation such as few men are willing to undertake. This obscurity of his has often been the butt of critical flippancy. When Ferrari published his annotated edition of Vico in 1854, the stage of his editorial attainments was marked by a reviewer thus: "We may now read Vico without understanding him;" and Weber, who translated Vico's *magnum opus* into German in 1822, received the following doubtful compliment on his fidelity to the original: "When he does not understand his author, as is often the case," said the sympathetic critic, "he makes a virtue of necessity and reproduces in German the obscurity of the Italian; but there is this difference, that while the author of the text knows what he is saying, the translator does not."

It is needless, we fancy, to note that Professor Flint's pages afford no opportunity for any such critical *pervisflage*. Their style has throughout the deep lucidity of completed thought. It is a means admirably fitted to the end of such a work as this, which, we take it, is to popularize the recondite study of philosophical doctrines by presenting them in a more easily intelligible and more widely attainable, while not less authoritative form, than any in which they have hitherto appeared. No one, indeed, could be better fitted than the author of *The Philosophy of History in Europe* to present in brief compass a full and trustworthy account of the pioneer of that philosophy in modern times. The work before us is limited to Vico in himself, and does not seek to go very deeply into his influence upon the philosophy of his country and of Europe. It is therefore with a pleasurable expectation that we note Professor Flint's promise to trace these matters in detail in the second volume of his larger work on this subject.

Giambattista Vico was not exclusively a jurist. His learning comprehended a wider sphere than that occupied by things legal. His genius was quite as plainly apparent in the departments of philology and metaphysics as in that of jurisprudence, and it is to his historical speculations that he mainly owes his fame. But throughout his life his attention was keenly fixed on law and jurisprudence as objects of study and reflection. He began life as a pleader in his native city, Naples, which in his time, as we are told, contained thirty thousand thieves, and swarmed with advocates. An academic chair of jurisprudence was the object of his

constant ambition. A large part of his masterwork, the *Scienza Nuova*, is taken up with an exposition of the philosophy of law, and he published two works especially devoted to the study of scientific jurisprudence, the one a treatise *De uno universi juris principio et fine uno*, published in 1720; the other, a sequel to the former work, entitled *Liber alter qui est de constantia jurisprudentis*, which followed in 1721. In these works he expounds a system of jurisprudence which anticipated the results attained by many subsequent workers in the same field—notably Montesquieu, and which is of special interest to us from its general harmony with the conclusions of Scottish jurists. These works, too, show that the study of law first revealed to Vico the radical conception of history, with which his name and fame are bound up. "The study of law," says Professor Flint in this connection, "for a man who brings to it, as Vico did, a large mind and the right spirit is one of the grandest possible. Jurisprudence is in ultimate connection with theology, ethics, politics, history and philology. It receives light from and sheds light on all general philosophy and almost every special science."

What the study of law primarily brought to Vico was a method which he found exemplified in the treatise of Grotius, *De Jure Belli ac Pacis*. It was, briefly stated, an appeal to the verdict of humanity in support or confirmation of his doctrine. His *ποῦ σρά* is the *communis aliquis consensus* on which Grotius bases the law of war. Taking this common sense, common faith, common nature or collective reason of humanity as his criterion of truth, he put to its test all the crucial questions of jurisprudence. This is his first point of resemblance to Scottish jurists. As common sense is the foundation of the Scottish philosophy, so is this impartial appeal to the spontaneous judgment and common nature of mankind a characteristic proof in the arguments of Stair, Ferguson, and their successors. It is only by reason of their *congruentia naturæ* that men can be brought together and held together in society, and law is the embodiment of that community of nature. It was from this principle, found first in jurisprudence, that Vico by extending the field of its operation thought out his famous historical theory of an organic life in nations, and his new science appeared as having a special regard *alla comune natura delle nazioni*.

Proceeding from this starting-point, and returning to it constantly for confirmation and verification, Vico builds up a philosophy of law, the most striking feature of which is a double adherence to the dictates of reason and authority. It is not enough for him, as it is for the pragmatic jurists of the school of Austin, for example, to postulate only the command of sovereignty or the supreme wisdom of a legislature as a rational sanction for human law. Nor, on the other hand, is he content to proceed on an exclusively *a priori* method, like Kant, say, and those who

before or after him have hunted the shadow of universal peace. As the nature of man is twofold, so must the rule of conduct for man have a dual application, founded on philosophy, the inward guide, and history, the outward. This dualism goes beyond the sphere of jurisprudence in Vico's system, and thus his *Metaphysics* has been described as a work which "paved the way for the only philosophy which can reconcile idealism and realism." When, therefore, he comes to consider the problem of the origin of society, he can accept neither the solution of a social contract, which was so popular in pre-revolutionary France, nor that of a state of nature as distinguished from a state of society; and here he is at one with Lord Kames, who was demonstrating the fallacy of such a theory simultaneously with our philosopher. He finds the solution in the common nature of mankind. Man is man, he holds, only in so far as he is capable of association with his fellows, and law is the regulative principle of human association.

From the same root springs his doctrine of penal law. Only in so far as man has acted out of accord with his nature is he justifiably punishable; and only in so far as external punishment supplies the place of inward shame and remorse can it be made legal. This is a doctrine which has gained wide acceptance among modern thinkers. Hegel expresses it with his usual felicity in the maxim that by the conscious commission of crime the higher nature of man consents to punishment, and its logical sequence is the theory, first promulgated by Vico's compatriot, Beccaria, and since demonstrated fully by statistics, that education tends to diminish crime. In this, then, as in other departments of jurisprudence, we recognise Vico's anticipation of doctrines which are generally accepted as the product of a later age than his.

So, too, the law of nature as revealed in human history, no less than by the insight of human reason, appears clearly to him as the basis of municipal law. The three inseparable principles of freedom, guardianship, and conquest manifest themselves when natural law works in the civil affairs of men, directing the course of nations, "*nello che*"—to use his own words (*Opere*, V. 617)—"*rifulgon due grandi lumi d'ordine naturale de' quali uno è, che chi non può governarsi da sé si lasci governare da altri che 'l possa; l'altro è, che governino il mondo sempre quelle che sono per natura migliori.*"

The general scope and purport of Vico's jurisprudence as a whole is summarized by Professor Flint in a passage, the broad terseness of which renders it well suited for quotation here. The passage is at p. 44, and runs as follows: "The works on jurisprudence showed that the phenomena of law could only be understood when studied in their historical connections. They brought to light the principles of what is called the historical method, and applied them with considerable success to explain the development of legislation. They made it evident that systems of law are always relative to the general state of society in which, and to the

epoch of history at which they appear ; that laws are not made but grow ; that their growth is largely determined by the causes which account for the growth of the community as a whole ; that each of the great periods into which history ought to be divided must have its appropriate species of jurisprudence, its appropriate species of authorities, its appropriate species of reasons or fundamental laws, its appropriate species of judgments or decisions. In the sphere of law Vico reached the generalization that truth and justice come from God, but that human reason gradually comprehends them and discovers philosophical law, which is the product and final form of 'civil law.'"

The generalization to which the learned professor adverts in the concluding sentence of the paragraph which we have just quoted marks another and the most essential point of Vico's spiritual kinship with the philosophic jurists of our own country—that depth of reflection which discerns in all law the guiding hand of a Divine Providence. Vico was no "theological" jurist. He saw plainly the inadequacy of resting jurisprudence on a direct revelation of Divine Will. But he saw, nevertheless, that the study of human history and human law revealed distinctly, if not directly, the superhuman regulation which sways men in nations, in families, and in their own hearts. For him, as for Ulpian, jurisprudence was the knowledge of things divine as well as human. From the facts which came within his cognizance in the study of law he derived a doctrine of Divine Providence, borne witness to by the common sense of mankind. It was the Absolute Reason operative in all finite minds—a Spirit that does not dwell beyond the stars, but in all spirits.

Obituary.

WILLIAM SAMUEL COOPER, ESQ. OF FAILFORD, ADVOCATE.—We regret to have to record the death of this gentleman, who died on the 27th August, at the age of thirty-eight. He was the eldest son of the late William Cooper, Esq. of Failford, and was educated at Trinity Hall, Cambridge, and was LL.M. of that University. He was called to the Bar in 1871. While not practising to any very large extent there, he frequently acted as Sheriff-Substitute at Kilmarnock, and his decisions in that capacity were satisfactory and sound. On the death of his father, a few years ago, he retired from the Parliament House, and went to reside in the country. Always fond of literary and antiquarian pursuits, he devoted considerable time to work of this kind. He was the author of a *History of the Ayrshire Regiment of Yeomanry*, in which he was a captain; and at the time of his death, we believe, he was engaged in editing a collection of charters for

the Archæological Society of Ayrshire. Mr. Cooper, whose loss will be deeply felt in Ayrshire, married in 1878, and has left a widow and family.

The Month.

Bookmakers.—The genus bookmaker may be said to be divided into two species,—the first, remarkable for making books at a loss, known in common parlance as authors; the second, equally remarkable for making books at a profit, known in sporting language as “bookies.” The following remarks apply simply to this latter and better known species, with reference more especially to the important effect the decision of the Court of Appeal in *Read v. Anderson* will have on their social and commercial position.

The confirmation by the Court of Appeal of Mr. Justice Hawkins’ decision in this case may be said to have given to their transactions a legal recognition, which, for practical more than sentimental reasons, they have received with feelings of justifiable pride and elation. The common, or racecourse species of bookmaker, of gorgeous hues and busy hum, is not probably at all affected by this decision; his haunts and habits stamp him as a “ready money” bookmaker—a class the law abominates, and his transactions have not, by the decision, been made in any way more legal than before; but his rarer and more exclusive *confrère*, the turf commission agent, is, by the case of *Read v. Anderson*, placed on equality with the general class of agents. Since this decision we assume that it will no longer be necessary for these hitherto exiled and expatriated gentlemen to have their offices so inconveniently situated: their advertisements, carefully framed to obtain commissions to act on the turf as agent, may now safely issue from St. James’ or the Royal Exchange, instead of as hitherto from Boulogne-sur-Mer.

The facts in *Read v. Anderson* are, we assume, sufficiently well known to our readers to render any detailed account of the case superfluous. It will be remembered that, by an unfortunate mischance, the case originally came on before Mr. Justice Hawkins, a judge who has himself confessed on the bench to an almost total ignorance of sporting matters, and, taking this into consideration, his lordship is to be congratulated on his judgment, which gives evidence of a grasp of the subject such only as an enthusiast usually possesses.

It will be, however, desirable, for a better comprehension of our further remarks, to briefly recapitulate the case in outline.

One Anderson, a publican, had for some time employed Read as his turf agent; for the Ascot of 1881 he instructed him to lay certain sums on certain horses at that meeting; the bets were

got "on," and lost; but after the bets had been paid, Anderson declared it to be his fixed intention to repudiate his liabilities. Some points arose as to the receipt of telegrams, the custom to telegraph reply that the bet was "on," etc.; but all these points his lordship dismissed summarily: we will do likewise. After taking time to consider, his lordship gave his judgment on the broad legal view of the case—firstly, that when A authorizes B to bet for him in his (B's) name, the law will imply a request by A to pay the bets if the money is lost; secondly, that the moment the bet is made the authority to pay (if coupled with an interest based on a good consideration) becomes irrevocable in law; and thirdly, that it is not material that such obligation is not enforceable by process of law, if the non-fulfilment of it will entail serious loss or inconvenience on B. We are indebted to the report in the *Law Times*, vol. xlvii. p. 74, for this statement of the decision, having slightly altered the head note.

The arguments which lead his lordship to these conclusions may be summarized shortly. In the first place, 8 and 9 Vict. c. 109 did not make wagering contracts *illegal*; it simply made them *null* and *void*. The distinction is aptly illustrated by Erle, J., in *Fitch v. Jones* (5 E. & B. 238), which his lordship cited. Erle, J., said: "I think the defendant might without violating any law make a wager, and without violating any law he might pay, if he lost; but the law will not assist the winner in enforcing payment of it." The distinction is not, as many other legal distinctions, one without a difference. The object, then, of the commission or authority was not illegal; if A himself lawfully pay the bet if he lost, naturally he can authorize B to pay it for him. Next, the authority to bet after the bet has been made becomes at once irrevocable; the law is clear, that if A employs B to do some act which will involve B in personal liability, or in loss or inconvenience, that authority cannot be revoked when the act is done; and further, that it does not matter that the obligation which the agent undertakes is not one which could be enforced in a court of law, provided the non-fulfilment would entail serious loss or inconvenience on the agent. This last statement his lordship does not appear to have supported by any authorities. On this point it is that the Master of the Rolls, on appeal, attacks Mr. Justice Hawkins' law, and inferentially, of course, that of Lords Justices Bowen and Fry, with whom he differed.

The Master of the Rolls fully admits that the authority cannot be revoked if the act authorized will subject the agent to personal liability; but this liability must, his lordship holds, be a liability enforceable at law. How can the law recognise a liability which, if called upon, it would decline to enforce? Assume, says the Master of the Rolls, that Read had refused to pay these bets, could he have been sued in a court of law? Certainly not. What liability, then, has he incurred? Only the liability to lose his right

of entrance to Tattersall's and the Ring; and what would be the nature of the damages which he would thereby suffer? The loss of that very business to which the law objects. It will be seen that the argument works round gradually to the question whether, if Read had not paid and had been expelled from Tattersall's and the Ring, and had suffered loss of business and damage thereby, could he (Read) have sued Anderson to recover such damages? We should question whether the Court would not, if the action had been presented in that form, have been compelled to hold that Read had not suffered any infringement of an "*injuria*," and that the "*damnum*" sustained was therefore one which the Courts could not recognise.

Lord Justice Bowen, in support of his argument that the appeal should be dismissed, somewhat irrelevantly asked, Who would expose himself to the risk of betting in his own name for a principal who was to be at liberty to pay or not as he chose? But surely his lordship cannot desire to assist, even incidentally, that which the Legislature has shown its desire, if not to render illegal on account of the impossibility of so doing, at least to deprive of the sanction of the law?

To our mind, few cases which have come before the Courts are as open to discussion as this; the wonder to us is, not that the Master of the Rolls should have differed, but that three judges should have been found to agree on the point. On the whole, the opinion of the Master of the Rolls appears to us to be a judgment of law; the opinion of the other judges a judgment of expediency. But it is somewhat difficult to see, if betting transactions are *null and void*, why all other transactions springing out of them should not also be *null and void*. On the other hand, if men choose to bet and employ turf commission agents, there seems equally little reason why such agents should not possess the legal means of compelling a dishonest principal to pay.—*Gibson's Law Notes*.

The French Divorce Act.—The Divorce Act, which the French owe to M. Naquet's untiring efforts, has only been law a week or two, and already several thousand suits have been set down on the cause list in Paris alone. This is to be explained by the fact that the new law places couples who have been judicially separated for more than three years in the position of English couples over whom a decree *nisi* has been pronounced. They can now have their decrees made absolute by a simple application to that effect from one or other of the parties. As the annual average of judicial separations in France during the last twenty years has exceeded six thousand, the number of people who stand qualified for divorce without further process must be reckoned by the ten thousand; so that the courts will have to dispose of enormous arrears before the first regular case under the new Act comes on for trial. It is of importance that this Act should be

well understood in this country, for it will affect many English people who have married French husbands or wives, and some of these may, indeed, be agreeably surprised to learn how many are the grounds on which ill-mated persons can now claim relief from an irksome bond. The French Act goes much further than the English, and the first thing to be said of it is that it embodies two principles which are novel to the legislation of this and other countries, and one of which is somewhat repugnant to those who take the highest view of marriage as a union for better or worse. Hitherto it has been usual, except in Scotland, to allow the husband more latitude in moral misconduct than the wife; and in France this was markedly the case, for while a husband could sue for a judicial separation on the ground of his wife's infidelity, the husband's unfaithfulness was only regarded as criminal when it was aggravated by certain very gross and rarely occurring circumstances. To an amendment, moved in the Senate by the distinguished Protestant pastor De Pressensé, Frenchwomen will owe that the misbehaviour of a husband will for the future be treated as heinous in exactly the same degree as that of the wife. What is wrong in Gaia will be wrong in Gaius, and we may see at once that the social effects of this reform, which will make it a serious thing for men to trifle ever so little with their connubial duties, are likely to be far-reaching and can hardly fail to be beneficial. But we greatly doubt the expediency of granting a divorce in sundry other cases specified by the new Act. Henceforth, if a husband or wife is sentenced to what the French call *une peine infamante*—that is, to transportation or penal servitude—the consort will be entitled to a divorce by merely proving the conviction. This is quite a new thing, and when we come to consider the manifold offences which are to be included under the head of *injures graves* (moral injuries)—another good plea in a divorce suit—we find that French couples will practically be able to get severance whenever any sort of domestic trouble arises between them.

Moral cruelty, of which the French Act makes so much, is a thing of which our own divorce law hardly takes cognisance. What we call cruelty—that is, blows, brutality, systematic harshness and unkindness—is provided for in the French Act under the head of *Excoés* and *Servicés*? but *Injure* is the offence by which one consort affronts or brings obloquy upon the other. Habitual drunkenness is to be treated as an injury, and few will deny that it is one. The drunkard may be a good husband or wife when sober; but the time seems to have come when people who have long endured the misery of being linked to a creature hopelessly addicted to drink should get relief. The great argument in favour of enabling a man or woman to put a drunken mate away is that this will doubtless diminish the crimes of violence which result from drunken brawls, and also save children from the

contamination of a drunken father's or mother's example. On the other hand, there appears no sufficient reason why the *injure* which consists in a consort's "habitually insulting the relatives of the other," should be admitted as cause for a divorce. The Parisians have already nicknamed this clause as one "for the protection of mothers-in-law." The general tendency of the Act is, that when husband and wife have got to be intentionally offensive to each other they should be put asunder, and this principle has been carried so far that offensiveness is defined as any act by which husband or wife draws disgrace on the family name so that the other is ashamed to bear it. Thus while, as already said, a sentence to penal servitude will give the convict's partner a divorce *de jure*, a divorce on the plea of *injure* may be applied for by a woman whose husband has been sentenced to ordinary imprisonment for theft, who has been expelled from a club for cheating at cards, or from the Army, Navy, or Bar for grave professional misconduct. It will be curious to see how an Act so wide in its application works; but to those who know how sentimentally inclined French juries are, it will be a matter for congratulation that divorce cases are to be tried in the ordinary civil courts before three judges without juries. No special courts have been created, and the procedure will be the same as in the suits for judicial separation heretofore. When a petition has been filed, the two parties will be summoned privately to the presiding judge's chambers for an attempt at reconciliation—a touching formality which, we believe, has never been known to succeed, but which has furnished countless judges with the opportunity of delivering little homilies on conjugal forbearance. When the petition is based on reasons which do not appear to make the reconciliation hopeless, it will be open to the judges to adjourn the hearing of the cause for a twelvemonth, ordering the parties to live separate in the meanwhile. A decree of divorce may be made absolute at once, subject to the right of appeal by either of the parties. The appeal must be lodged within two months after judgment, and after the Court of Appeal has pronounced a final decree recourse may be had to the Court of Cassation on points of law. The woman divorced at the suit of her husband is to lose her married name, and will be liable to punishment if she continues to bear it against her husband's wishes; she will also lose her dower; and similarly, the husband who is divorced at his wife's instance will forfeit all the money she may have brought him. Divorced persons will be free to re-marry, and they will even be allowed to re-marry each other, unless, having both re-married, one or other of them shall have been divorced a second time. But if a man after divorce re-marries and becomes a widower, he may take back his first wife, and *vice versa*. It should be mentioned that the newspapers are to be prohibited from publishing the evidence in divorce trials.—*The Times*.

THE new Building Societies Act (47 & 48 Vict. c. 41) is intended to obviate the difficulties which have arisen in deciding whether disputes should or should not be referred to arbitration, and to alter the law as laid down by the House of Lords in *Municipal Building Society v. Kent* (9 App. Cas. 260; 51 L. T. Rep. N. S. 6), when Lord Selborne dissented from the majority of the Court, and suggested that the attention of the Legislature would probably again be directed to the whole subject of building societies. In the above-mentioned case, *Hack v. London Provident Building Society* (48 L. T. Rep. N. S. 247; 23 Ch. Div. 103), and *Wright v. Monarch Investment Building Society* (5 Ch. Div. 726) were approved. It will be seen that the effect of the new Act will be considerably to limit the area of compulsory reference to arbitration, and proportionately to extend the jurisdiction of the Courts. By sec. 2 of the new Act the word "disputes" in the Building Societies Acts (*i.e.* the Acts of 1874, 1875, 1877), or in the rules of any society thereunder, shall be deemed to refer only to disputes between the society and a member or any representative of a member in his capacity of a member of the society, unless the rules expressly provide otherwise, and, in the absence of express provision, the word shall not apply to a dispute between the society and a member, or other person, as to the construction or effect of a mortgage deed, etc., and shall not prevent the society or member from proceeding at law in the ordinary course. The grammar of the last sentence is obscure, but its obvious meaning is that, in the instances mentioned, provisions of the Act and Rules declaring that "disputes" shall go to arbitration or other specified tribunal shall not prevent ordinary legal proceedings. There is a proviso certain pending disputes from the operation of the Act.—*Law Times*.

Postage Stamp Forgeries.—Messrs. J. W. Palmer & Co. write to the *Law Times* as follows:—Inclosed we have the pleasure of sending you a copy of sec. 7 of the new Post Office Protection Act, which came into operation on the 1st September 1884, from which it will be seen that the Legislature has provided for the protection of stamp collectors, and has authorized the Commissioners of Inland Revenue to take summary proceedings before the magistrates to prevent any future dealing in forged stamps. The section will also have the effect of putting a stop to the issue of illustrated stamp catalogues, which have, as we believe, been a fruitful source (through the blocks used in the printing of them) for the production of forgeries. As you have been kind enough on previous occasions to insert communications from us which have resulted in this section being inserted in the Act of Parliament, we have no doubt it will interest your readers to know the result of the agitation which was initiated by us, and which has cost us in hard cash over £3000. J. W. PALMER & Co.

[COPY.]

By an Act of Parliament, 47 & 48 Vict. c. 76, s. 7, it is enacted as follows:—

A person shall not—

- (a) Make, knowingly utter, deal in or sell any fictitious stamp, or knowingly use for any postal purpose any fictitious stamp; or
- (b) Have in his possession, unless he shows a lawful excuse, any fictitious stamp; or
- (c) Make, or, unless he shows a lawful excuse, have in his possession any die, plate, instrument, or materials for making any fictitious stamp.

Any person who acts in contravention of this section shall be liable on summary conviction, on a prosecution by order of the Commissioners of Inland Revenue, to a fine not exceeding twenty pounds, subject to the like right of appeal as in the case of a penalty under the Acts relating to the Excise.

Any stamp, die, plate, instrument, or materials found in the possession of any person in contravention of this section, may be seized and shall be forfeited.

For the purpose of this section, "fictitious stamp" means any facsimile, or imitation, or representation, whether on paper or otherwise, of any stamp for denoting any rate of postage, including any stamp for denoting a rate of postage of any of Her Majesty's colonies, or of any foreign country.

A LADY was called before Mr. Justice Patteson to identify certain inner garments, etc., as being articles of her own wardrobe. "Yes, my lord, these are my property." "No, no; you identify them, dear madam, but they are not your own property," quoth Patteson. "Yes, my lord, they are." "No, no; you wear them, and you know them, but these garments are your husband's." "*My husband's*, my lord," with great indignation; "no, my lord, my husband doesn't wear such things, they are mine." "Oh, no, no, my dear lady, I know you wear them, but they are your husband's." "They are not, my lord, they are mine." "No, no; I tell you they are your husband's; but it's no use talking, women won't understand these things."—*Pump Court*.

DOGGEREL FOR DOG-DAYS.

THE following is from the *Portland Advertiser*. It is a faithful report of *State v. Harriman*, 75 Me. 562; S. C., 46 Am. Rep. 453, holding that dogs are not "domestic animals."

A dog, Miller had, that was well-bred and knowing,
Worth a hundred or more as good dogs are going.
He lived in Wiscasset, a quiet old town;
The dog in his back yard patrolled up and down,
And guarded his house from burglars and thieves,
If aught worth the stealing any believes
Could be found in the quiet old burgh of Wiscasset—
Though for ruinous beauty no town can surpass it.
This well-behaved creature, in no mischief caught,
In the peace of the State, one Harriman shot.

Provoked at the outrage, the owner then cited him
To court, and the jury for malice indicted him.
Of the criminal law 'tis a prominent feature,
That whoever with malice a domestic creature
Shall kill, poison or maim, or only disfigure,
By stabbing or beating or drawing of trigger,
Of grave misdemeanour shall guilty be held,
And be fined for the crime, or in prison be celled.

The dog-killer hied him to Counsellor Moore,
A lawyer well versed in juridical lore,
To make a defence with skill and with tact
That should forefend the pains of his treacherous act.

"The killing the dog, you cannot deny?"
"I can't," said the man, "I can't tell a lie.
By daylight I shot him, provoked at his howling,
That kept me nights long, mad, sleepless, and owling."

"Well, then, we'll admit the killing the cur,"
Said the lawyer, "and to the indictment demur.
To the court we will plead—this gets rid of the jury—
That a dog is a creature *feræ naturæ*."

"What that means," said the client, "I hain't an idea,
But 'twill gravel the court I see very clear."

So the court took the plea, and over the tangle
For more than a year they had a fierce wrangle.
The old chief on one side with his strong common sense,
The subs on the other with old precedents.

D——th——most of the court sustain him—
Then uttered thus his *cave canem* :

“ The common law doctrine, as clear as the day—
At least so our own and the English books say—
Is, that dogs must be classed with animals wild,
From all human fellowship wholly exiled.
A dog being worthless, unfit for food,
An indictment for stealing him would not be good.
Some dogs here and there have been now and then tamed.
And domestic animals so have been named ;
But such is loose language falsely applied.
A dog is domestic when he is tied.
Every loose dog is wild, and so you see hence it is
He's a domestic creature with vicious propensities.
Dogs keep their wild traits, and their old wolfish fury ;
They're allied to the class called *feræ naturæ*.
They help not the man on whose bounty they wait ;
They are not assets of a dead man's estate ;
Add not to the wealth of the State or the Nation ;
The statute aside, they're not beasts of taxation.
' A good, wicked dog,' once an Irishman said,
' Is a very good thing.' But when they are bred
Their natural wickedness quite to suppress,
There's an end, so I think, of their whole usefulness.
'Tis their fierceness alone, the burglar confronting,
That makes them of service for watch or for hunting.
These instincts, producing their normal fruition,
Make canines relapse to their savage condition.
Every well-ordered State, for this very cause,
Like our own, has its Code of special dog laws—
Not to favour the dog—the rather in slight of him,
To render the people more safe from the bite of him—
Strictly just 'tis, and square with all legal usance,
To kill any dog as a palpable nuisance ;
For killing him only is ever awarded
Civil damage, in books see cases recorded.”

To this dictum dogmatic the rest gave consent,
Save the erudite chief, who thus said in dissent :

“ Your mind, Brother D——th——, is shrouded in fogs ;
'Tis plain you know more of the law than of dogs ;
You can't love a creature you're always afraid of,
The dog to be known must be studied and made of ;
You must summer him, winter him, train him, and keep him.
Must live with him, play with him, eat him, and sleep him.
In nature the wise man, in books reads the clerk ;
But you can't tell a dog as a tree by his bark.

In often-thumbed volumes, though studied for years,
 What parts of a dog can you find but his ears?
 Brother D——th—— talks well, but yet of the sort is he,
Qui hæret in litera hæret in cortice.

From the time of the pyramids down to our own,
 Where'er man has lived, in whatever zone,
 The dog in his dwelling, life and goods to defend,
 Has lived with his master, companion and friend,
 Has brought from the forest the game he has slain,
 A light-sleeping sentry by his portal has lain,
 In walks through the fields by his side has he strayed,
 In sports of his children has frolicked and played.
 At first he might have been *feræ naturæ*
 When mastodons browsed on the plains of Missouri.

But so were all beasts, cattle, horses and hogs—
 Why bring the fact up to damage the dogs?
 If the law has not learned of his domestication,
 The law, behind times in its education,
 Had better read up; and as I estimate,
 Is itself in a *feræ-natural* state.
 The dog, by the Romans esteemed very much,
 Was a part of the homestead and treated as such.
 The Senators had their *canes villaticos*,
 The hunters afield their *canes venaticos*;
 The shepherds thought much of their *canes pastorales*;
 There must have been showmen with *canes solitales*;
 Dogs born on the farm were *canes natales*,
 And taxable dogs *canes vectigales*;
Quales conditiones in nomine tales.
 In Greenland, where even the reindeer would perish,
 As fair beasts of draught the Esquimaux cherish
 The tough little dog. 'Tis said he can earn
 Good wages in turning a rotary churn.
Domestic—that means attached to the house;
 Pray tell me do swine, sheep, horses, and cows
 Belong to the *house*?—they belong to the *barn*;
 Plain people, I think, would be puzzled to learn
 That *creatures domestic* mean't a bull or a hog,
 And did not include the house-dwelling dog!
 Why should not the law presume the dog tame?
 Does history tell of, or science give name
 To the *wild* canine species? wolf, jackal, and bear
 Each a part in his pristine paternity share;
 And these are found wild, just as wild as they were,
 But the primitive dog in Egypt as known
 Was as docile to man as to-day he is shown.

But who the dog's father was you care not, for, ah!
 I see you think more of his ma than his pa.
 Not property? worthless? how can this be,
 When the law makes him subject of larceny?
 He is taxed too in some States—let us look at the facts—
 Can a thing not property carry a tax?
 So the dogs being property, creatures domestic,
 The law must trample in march majestic
 On musty decisions of dog-hating judges
 (And with elbow the chief his neighbour nudges),
 And decide according to reason and science,
 And on obsolete precedents place less reliance."

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF ABERDEEN, KINCARDINE, AND BANFF.

Sheriff SCOTT-MONCRIEFF.

DOW v. JACK.

Imprisonment for non-payment of aliment under the Civil Imprisonment Act of 1882.—Sheriff Scott-Moncrieff pronounced in this case the following judgment: "In this case Elspet Dow presents an application under the Civil Imprisonment (Scotland) Act, founded upon a decree which she holds against Robert Jack for the aliment of their illegitimate child. The child was born so long ago as August 1869. The decree is dated 1879, and it decerns for aliment at the rate of £5 yearly for the period of seven years as from the date of the child's birth. At the time, therefore, when judgment was given the child had lived beyond the age at which the aliment was to stop, and the action was one not really for future aliment, but entirely for arrears. In August last their child, if still alive, must have attained the age of fourteen years, when in the ordinary case all claims for aliment cease. It is in these circumstances that I am now called upon to send Jack to prison unless he can satisfy me that his failure to pay this old debt has not been wilful.

"Had it not been for recent expressions of judicial opinion, I should have had little difficulty in holding that the 4th section of the Civil Imprisonment Act applied to such a case as the present—we have here a decree pronounced by a competent Court for 'sums of aliment.' Now, a similar expression occurring in a former statute has been held to cover inlying expenses. See *Cheyne v. M'Gungle*, July 19, 1860, 22 D. 1490. But if inlying expenses, which are unquestionably arrears, why not all other arrears? The decision of the majority of the Second Division in *Tevendale v. Duncan*, March 20, 1883, 10 Ret. 852, has, however, thrown new and important light upon the whole subject. It is true that the circumstances of that case differed from those of the present.

Instead of being, as here, the mother of an illegitimate child, the pursuer was an inspector of poor seeking repayment of advances made to a deceased pauper. But although the circumstances may differ, it does not necessarily follow that the principles then laid down cannot apply to such a case as the one now before me. In the opinion of my learned colleague Sheriff Dove Wilson they do,¹ and he has accordingly applied them where the position of matters was not unlike that with which I am now dealing. To his authority upon a question of this sort, I need hardly say that I attach much weight. The leading opinion in *Tevendale v. Duncan* was given by Lord Young, and his explanation of the expression 'sums decerned for aliment' is as follows: 'I think the true meaning is that the sums must be decerned for with a view to be applied, when they are got, in alimenting the party in whose favour the decree is given. I do not mean that the decree might not be given to a trustee or a relative to apply these sums for behoof of the person to be alimented; but the decree must be for sums to be used in alimenting some person or other.' With Lord Young Lord Rutherford Clark concurred without adding any remarks. He may therefore be held to have given an unqualified assent to the views then expressed. The Lord Justice Clerk also agreed with the result at which Lord Young had arrived, observing that wherever the sums decerned for aliment cannot be applied for aliment, as in a case of the death of the person, the demand is nothing but an ordinary debt. The opinions of these learned judges were framed, of course, with special reference to the case before them. But Lord Craighill, who formed the minority, and who spoke before the Lord Justice-Clerk, clearly understood them to apply to the case of the mother of an illegitimate child suing for arrears of aliment. If he was wrong in this, his brethren certainly did not correct him.

"Lord Young's opinion is, that the sums decerned for are to be applied when they are got in alimenting. But here, as already pointed out, the child had attained the age of seven before the action was brought, and at the present date it is to be presumed is able to work for a living. What Elspet Dow virtually seeks, therefore, is repayment to some extent of the money which, earned by her own industry or obtained through the help of friends, she expended upon the support of her child. In respect of the authorities referred to, I am not prepared to enforce such repayment by a sentence of imprisonment.

"I think a distinction may fairly be drawn between such a case as the present, when there is nothing but an old debt, and one where, although arrears of aliment are sought, there yet remains a portion of the time unexpired during which, under the decree, aliment is to be afforded. In the latter I am hardly prepared to say that *Tevendale v. Duncan* would necessitate the anomalous result to which Lord Craighill refers, viz. the division of the sum of aliment into the parts for the one of which a man may, and for the other he may not be imprisoned. But with such a case I have not to deal at present."

¹ See September number of the *Journal of Jurisprudence*.

SHERIFF COURT OF DUNFERMLINE.

Sheriff-Substitute GILLESPIE.

GIBB v. DUNFERMLINE CO-OPERATIVE SOCIETY.

Payment of share capital by Co-operative Society on presentation of pass-book.—The Sheriff's decision was as follows:—

“The pursuer is a member of the defenders' Society. At the beginning of February there was admittedly a sum at his credit of £15 odds. According to the constitution of the Society, the relation of the members to the Society is that of partners, and not of depositors. This distinction, however, which would be all-important in many questions, does not appear to me of any moment in the present case. It is conceded that the defenders are bound to account to the pursuer for the sum standing at his credit. In doing so, they claim to take credit for the payment of various sums between the 11th February and the 13th of March—amounting in all to £11, 10s. It is proved that these sums were paid to three different persons, who, on six occasions between these two dates, came to the store and presented the pursuer's pass-book. These persons were—Magdalene Hutton, who figures largely in the case; a Mrs. Gibbon, and her son. It is proved that the two latter were merely the messengers of Magdalene Hutton, and that she received the whole £11, 10s.—the greater part directly from the defenders, and the rest through Mrs. Gibbon and her son. On one occasion, when Magdalene Hutton drew £3, she seems to have been asked by the defenders' official who paid the money what it was wanted for, to which she replied, that the pursuer's mother was badly. On no other occasion when the pursuer's pass-book was presented was any question asked of, nor statement made by the person presenting the book, and neither Magdalene Hutton nor either of her messengers were known to the defenders' officials. The defenders are therefore unable to say that, apart from the possession of the pass-book, there was anything to lead them to believe that the persons to whom they paid had authority from the pursuer to receive the money. Their defence is twofold. They maintain that, altogether apart from the circumstances of this case, they were entitled to pay on presentation of the pass-book. No doubt that would be the case if the pass-book were a negotiable instrument, such as a bank-note, or a bill or bond payable to bearer. But I cannot hold that a pass-book, substantially of the same character as a bank pass-book, is one of those instruments which by statute or established mercantile usage enable the bearer to demand implement of the obligations contained in them. This pass-book appears to me essentially different from any of the classes of documents to which it was attempted to assimilate it. Something was said as to the usage of similar societies. Except in regard to the Dunfermline Savings Bank, a copy of whose rules was laid on the table, there was no evidence in regard to other societies. I believe it to be the fact that the rules of many savings banks and similar societies contain a provision that in certain cases the presentment of a member's pass-book shall be a sufficient war-

rant for payment to the bearer, though, if I am not mistaken, the provision is generally fenced with a limitation that only sums below a certain moderate amount can be drawn without the personal attendance of the member, or a written order by him. It is plain that the practice of societies having a definite rule on the subject cannot be referred to to support a supposed general usage of treating such pass-books as conferring a right of payment on the person in possession of them. But although this pass-book cannot be regarded as a negotiable instrument, it would still be open to the Society and its members to contract that the possession of the pass-book shall be a sufficient voucher for the Society to pay to the person who presents it. Such a contract would be binding on the member, though not necessarily on a person deriving right from him. Further, I am willing to assume that such a contract would be effectually constituted by a distinct provision to that effect in the rules of the Society, certified by the proper officer. There is, however, nothing in the rules to give possession of a pass-book the effect contended for by the defenders. Whether anything short of a distinct provision in the rules would be sufficient is, I think, doubtful. But it is not necessary to decide this, because, assuming that the pursuer's consent that payment to any one presenting the pass-book should stand good as payment to him can be inferred from the known usage of the Society, I think the evidence which the defenders have been able to adduce is not of that clear and unequivocal kind which is necessary to support the defence. It is important to keep in view that proof of what generally happens is not necessarily proof of such usage as can be imported into a contract. The treasurer of the Society stated that the majority of payments were made to persons other than the member himself; but it seems that in a large number of cases the messenger is the wife, child, or other near relation of the member, and the treasurer could not furnish any information as to the proportion which cases of payment to a stranger bore to the whole number of payments. Then there was no evidence that in any case payment had been made to a person who had not been authorized by the member, and consequently there could be no evidence that the member had acquiesced in such payments as binding on him. All that is proved is just as consistent with the view that the Society took the risk of paying to a wrong person as that the Society imposed that risk on the member. There is no evidence that the pursuer was aware that any one presenting his book at the store could draw money without being asked any questions. He was a new member. He had never drawn money himself, nor sent any one to the store to draw money. One may suspect, from some indications in the evidence, that he knew more about the practice than he is willing to allow. But even if he did, he would be entitled to say he knew the Society were very easy about paying, but he had no reason to suppose they were acting otherwise than at their own risk. The evidence, in short, does not afford sufficient materials to establish an agreement by the pursuer that the Society should be entitled to take credit for payments other than those which would stand good against him by the ordinary rules of law.

"The other defence raises merely a question of fact, of no importance except to the parties concerned. The defenders allege that, in point of fact, Magdalen Hutton had a mandate from the pursuer to uplift the

money, although they do not pretend that they were aware that she had such a mandate until after the whole sums were paid. I do not think that any presumption of mandate arises from the fact that Magdalene Hutton was acting as the pursuer's housekeeper, for authority to uplift money does not fall within the *præpositura* of a housekeeper nor even of a wife. In judging of the evidence I have had to travel over the same ground as in the criminal trial, but the issue is somewhat different. There I had to determine whether it was proved beyond reasonable doubt that Magdalene Hutton had been guilty of a criminal offence. I was of opinion, and am so still, that the proof was insufficient for this purpose. But in deciding a civil case arising out of the same facts, the question of mandate or no mandate must be decided in the same way as facts are generally arrived at in a civil case when the evidence is unsatisfactory, viz. by balancing the evidence on each side. I am inclined to think that the account which Magdalene Hutton gave in her examination in chief is not very far from the truth, and that it fits in very fairly with all that afterwards occurred. It is very probably true that, in order to induce her to accept the compromising position which she did accept, the pursuer held out that he was a man of means, and that he referred in a general way to the existence of the fund at his credit with the defenders as one which might be drawn on in case of necessity. I can quite well understand how the girl came to think that she had a right to take that money, and to half persuade herself that she had got express authority to do so. There was a curious mixture of openness and concealment in her conduct, which is best explained by her thinking that she was morally entitled to identify herself with the pursuer, at the same time being conscious that the way in which she translated the pursuer's vague talk would not be recognised by him. She said herself in her evidence that after she had drawn £1 or £2, she told the pursuer that she had drawn money; that he was angry, and told her not to do so again. I am of opinion, in short, that anything which the pursuer said fell considerably short of what the law can recognise as a mandate to uplift money. Such a mandate must be given in express and unambiguous terms, and to suppose that such an express and unambiguous mandate was given is not consistent with some things which Magdalene Hutton is obliged to admit. I should not have been sorry to have come to an opposite conclusion, because enough has been disclosed to show that the pursuer behaved badly in inducing a young girl to accept a situation which was certain to cause scandal if nothing worse, and if he had lost his money no one could have had much sympathy for him. But a Court would be transgressing its proper functions if, in its desire to vindicate morality, it strained the facts or the law. I believe that about £2 of the sums drawn by Magdalene Hutton were expended for the pursuer's behoof. The pursuer will get decree for the balance. I should be sorry that my decision should have the effect of throwing any impediment in the conduct of the business of the defenders' and similar societies, because the benefits which they have conferred on the nation can scarcely be exaggerated. I am aware how greatly the absence of formalities in lodging and uplifting money is prized, and that perhaps even to require the alternative of a signature or of personal attendance before money could be drawn out might diminish the popularity, and consequently the usefulness of the

Society. But any inconvenience which may be caused can only be very temporary. What I would humbly suggest to the defenders is, that if after due consideration they should be of opinion that the practice of paying on presentment of the pass-book is so essential to the popularity of the Society that it is desirable that it should be legalized, either with or without restriction as to amount or other safeguard, they should take the necessary steps for getting the rules altered by the insertion of a distinct provision as to the manner and effect of payment of money standing at a member's credit. It will be much better that this extensive branch of the defenders' business should be regulated by well-considered and definite rules than that it should be left to loose inferences."

Ad. Gorrie & Honeyman.—Alt. Ross.

SHERIFF COURT OF LANARKSHIRE.

Sheriff LEES.

JOHNSTON, PETITIONER.

*Process—Executry petition—Sheriff Courts Act of 1876.—Held that a petition for the appointment of an executor must be framed in accordance with the forms provided by the Sheriff Courts Act of 1876. In this action Rose Ann Johnston applied to be appointed executrix-dative to the deceased Henry Johnston, who she averred was her brother. There was a competing petition at the instance of James Johnston, Henry's father. Proof was asked of the averments in the petition; but the Sheriff-Substitute dismissed both actions on the grounds stated in the following note: "The petitioner asks to be decerned executrix-dative of the deceased Henry Johnston, who, she says, was her brother. There is a competing petition for the charge of the executry estate at the instance of the deceased's father, and he denies (verbally) that the pursuer is Johnston's lawful sister. Such a plea involves questions of much delicacy, and causes me to notice the form in which the application is made. The petition is framed in the form provided by the Confirmation and Probate Act of 1858, overlooking the fact that since 1876 such form cannot now competently be adopted, and that only the form provided by the Sheriff Courts Act of 1876 can be used. That Act (sec. 35) abolishes the Commissary Courts, and transfers their whole powers and jurisdictions to the Sheriff Courts; and section 6 provides that every action in the ordinary Sheriff Court shall be commenced by a petition framed in accordance with the forms contained in its schedule. The scope of these words came to be considered in the case of *M'Dermott v. Ramsay*, 9th December 1876, 4 R. 217, where the objection was taken that an application for a *meditatione fugæ* warrant could not competently be made in a petition framed in accordance with the Act of 1876. But the objection was repelled, and the universality of the statutory form was authoritatively declared by the Lord President, who remarked that 'the term action in this statute is made to include every case, and therefore*

this new form is applicable to this case as well as to every other.' The following year a similar point occurred in the case of *Crozier v. Macfarlane & Co.*, 15th June 1878, 5 R. 936, where the same Division held 'that a petition for *cessio bonorum*, being a civil proceeding competent in the ordinary Sheriff Court, could not be entertained by the Sheriff unless framed in one of the forms prescribed in Schedule A annexed to the Sheriff Courts Act, 1876.' This decision is the more closely in point when it is remembered that under the Cessio Act of Sederunt a different form had been provided. Almost the very point here raised was, however, the subject of judicial consideration by the Sheriff-Principal of this county about a year ago in a case in which it was objected that a petition for the appointment of an executor framed in accordance with the Act of 1876 was incompetent. But the objection was repelled, and the petition held properly framed. I understand the learned Sheriff was prepared, if necessary, to hold that no other form was competent, and that petitions for executry appointments must be framed in accordance with the Act of 1876, and not in the old form like the petition now before me. Indeed, the ratio of his judgment implies this, for the new form is competent only because it is, in terms of the statute, obligatory. I notice also that Mr. Currie, in his treatise on the *Confirmation of Executors*, adopts this opinion, and frames his applications in accordance with the views above stated. (See pp. 187 and 218.) So also in the standard work on *Sheriff Court Practice* (p. 543). Mr. Dove Wilson expresses the opinion that petitions for executry appointments must be framed in the form prescribed by the Act of 1876. Against these views no judicial opinion has, so far as I know, been expressed, and they coincide with the opinion I have long entertained. Indeed, it would seem to be the intention of the Legislature that in general initial writs in which issue may be joined shall be framed with a condescendence and plea in law. The Act of Sederunt as to judicial factors, it may be remembered, expressly prescribes that the application for the appointment shall be so made. Accordingly, I felt it necessary in my *Handbook of Sheriff Court Styles* to frame executry applications under the Act of 1876; and for a full statement of the reasoning applicable to this matter, I may, for brevity's sake, refer parties to note (c) on p. 93, where I state at some length the reasons why it would appear a petition for sequestration must be framed in accordance with the forms prescribed by the Act of 1876."

Act. Hays & Bird.

Notes of English, American, and Colonial Cases.

COPYRIGHT.—*Infringement—Injunction—Book of words for use in telegraphy—Secret code issued for private circulation.*—The plaintiff compiled and published a book consisting of a careful selection of 100,000 words, taken from eight languages, which could be used for telegraphic purposes with the least liability to error by the confusion of one word with another. To each of the words was ascribed a different combination of five of the

ordinary numerals 0 to 9. The book could be used by any one who desired to make a code of cypher telegraphy of his own by attributing to any of these words or to the equivalent numerals whatever meaning he might please, and communicating these significations to his correspondent. The defendants printed a number of books containing the bulk of the words contained in the plaintiff's book (such words being in fact taken from that book), but with numbers and significations of their own devising appended to each word. They distributed these books, which were marked "private," gratuitously to their own agents and to merchants with whom they were in correspondence:—*Held*, that the use which the defendants had made of the plaintiff's book was an infringement of his copyright. *Ager v. The Peninsular and Oriental Steam Navigation Company*, 52 L. J. Rep. Ch. 589.

COPYRIGHT.—*Injunction*—*Public lecture*—*Notes taken by shorthand writer*—*Publication in shorthand character*.—Where a lecture is delivered to an audience admitted by ticket without payment, there is an implied contract on their part not to publish such lecture for purposes of profit.—*Nicols v. Pitman*, 52 L. J. Rep. Ch. 552.—The plaintiff delivered a lecture at a working men's college to an audience who were admitted gratuitously by tickets issued by the committee of the college. The plaintiff had committed the lecture to writing, but delivered it from memory. The defendant, a shorthand writer, attended the lecture, took it down nearly verbatim, and subsequently published his notes in shorthand characters in a periodical brought out and sold by him for the instruction of learners of the art of shorthand writing:—*Held*, that the plaintiff was entitled to an injunction to restrain the defendant from so publishing the lecture.—*Ibid*.

TRADE MARKS.—*Trade Marks Registration Act, 1875* (38 and 39 Vict. c. 96), ss. 3, 5, and 10—*Descriptive word*, "valvoline"—*Five years' registration*—*Rectification of register*—*Injunction*.—In order that a word may be registered as a trade mark under the 10th section of the Trade Marks Registration Act, 1875, it must be shown that it has been used as a trade mark and not merely as descriptive of the article to which it is applied. If a word has been by mistake so registered, the registration which by section 3 makes it *prima facie* evidence of the right of the registered owner to the exclusive use of that trade mark, and the continuance of that registration for five years conclusive evidence of the same thing, does not prevent any one who finds himself aggrieved by that registration from applying under section 5 to have that mark removed from the register, but some burden of proof that the mark was improperly registered lies on the person making the objection. L. & E., in 1873, invented and used in America the word "valvoline" as descriptive of a particular kind of oil for valves, and in the same year they adopted and registered in America that word in combination with a device as their trade mark for the same article. In 1877 they registered the same mark in England, and in 1878 they registered the word "valvoline" alone in England as a trade mark for their oil:—*Held*, that "valvoline" was merely descriptive of lubricating oil, and that it had been so used by L. & E. from 1873 to 1878, and that the registration of it as a trade mark

in 1878 was wrongful.—*Leonard and Ellis v. Wells and Co. In re Leonard and Ellis's Trade Mark*, 52 L. J. Rep. Ch. (App.) 603.

Held, that another firm could not be restrained from using the word as descriptive of lubricating oils unless they used it in such a way as to lead the public to think that the articles so described were the manufacture of L. & E.—*Ibid*.

Decision of Pearson, J., affirmed.—*Ibid*.

TRADE MARK.—*Rectification of register—Person aggrieved—Trade Marks Act*, 1875 (38 and 39 Vict. c. 91), s. 5.—Whether under the Trade Marks Act, 1875, s. 5, a person is or is not "aggrieved" is a question of fact which must be decided in each case.—*In re Riviere & Co. and the Trade Marks Registration Acts*, 1875-77, 51 L. J. Rep. Ch. (App.) 578.

The Act imposes no limitation on the word "aggrieved," and if the person alleging himself to be aggrieved undertakes to bring his case within any one of the conditions on which the right to apply is given by section 5, the Court cannot *a priori* decide as a matter of law that he cannot have a grievance.—*Ibid*.

M. & Co., spirit merchants in Madras, instructed R. & Co., of London, to register for them a trade mark, and under that trade mark brandy was sold in Madras. R. & Co., however, registered the mark in their own name. Upon an application by M. & Co. for rectification of the register of trade marks by striking out the name of R. & Co. and inserting their own, Pearson, J., allowed a preliminary objection that M. & Co., as they were not carrying on or intending to carry on business and had never used the trade mark in England, were not entitled to register, and were not therefore aggrieved persons within the meaning of the Act, and dismissed the application. The Court of Appeal held that, even assuming M. & Co. were not entitled to be placed on the register (but which they did not decide), the Court could not, in the absence of evidence, treat it as a mere matter of law that they were not persons aggrieved within the meaning of the Act, and remitted the case to the Court below to be heard on the evidence.—*Ibid*.

COLLISION.—*Action for loss of life—Notice to Board of Trade—Foreign ship—Contributory negligence—Jurisdiction of Admiralty Court to entertain suit in rem—Damage done by any ship—Admiralty Court Act*, 1861 (24 Vict. c. 10), s. 7—*Lord Campbell's Act* (9 and 10 Vict. c. 93)—*Court equally divided in opinion—Decision not binding*.—In an action under Lord Campbell's Act for loss of life occasioned by a collision,—*Held*, first, that section 512 of the Merchant Shipping Act 1854 does not apply to cases of loss of life caused by a foreign ship. Secondly, that the breach of the rules for preventing collisions, to which the deceased was privy, and for which the Court would be bound to hold the ship to blame under the 17th section of the Merchant Shipping Act 1873, constitutes legal contributory negligence on the part of the deceased, even where there is no reason to believe that such breach of the regulation actually contributed to the accident. Thirdly, that contributory negligence on the part of the deceased did not debar the plaintiff from recovering any damages; but that, according to the rule obtaining in cases of collision,

the plaintiff was entitled to recover a moiety of the damage she had sustained. *The Vera Cruz* (App.), 52 L. J. Rep., L. D. and A., 33.

Per the Court of Appeal.—The Admiralty Court has no jurisdiction to entertain an action *in rem* to recover damages under Lord Campbell's Act for loss of life caused by a collision at sea.—*Ibid*.

The Court of Appeal is not bound by a decision of its own where that decision was come to by reason of the judges who heard the case being equally divided in opinion.—*Ibid*.

COLLISION.—*Signals for assistance—Stopping and reversing.*—A vessel which has been in collision with another is bound, in order to comply with the provisions of section 16 of the Merchant Shipping Act 1873, to answer signals made by the vessel with which she has been in collision, even where she is unable, owing to the damage she has herself sustained, to stand by the other ship. *The Emmy Haase*, 52 L. J. Rep., L. D. and A., 43.

The officer in charge of a steamship which is approaching another so as to involve risk of collision is not required to stop and reverse his engines instantaneously, but some short time must be allowed him in which to judge what course he ought to adopt in the circumstances.—*Ibid*.

COLLISION.—*Marine insurance—Policy on goods—Contract of sale—Free on board—Loss of goods—Non-appropriation of goods at time of loss—Vesting of property—Insurable interest.*—The plaintiff claimed to recover from the defendant, an underwriter at Lloyds', under a floating marine policy on goods, in respect of certain sugar lost on the 4th of February 1881, on a voyage from Hamburg to Bristol. The sugar so lost had been shipped in performance of two contracts entered into by D. and Co. (London merchants) with the plaintiff (a merchant at Bristol), and B. and Co. as hereinafter mentioned. By the first contract, dated the 7th of January 1881, D. and Co. agreed to sell to B. and Co. 200 tons of sugar of a certain quality, to be shipped from Hamburg to Bristol, at 21s. 9d. per ton net f. o. b., and for January delivery at Hamburg, payment by cash in London in exchange for bill of lading. By the second contract, dated the 12th of January 1881, D. and Co. agreed to sell to the plaintiff a similar quantity at a like price upon identical terms. D. and Co. were not aware until after the loss that B. and Co. had entered into the contract of the 7th January for the purpose of enabling them to execute a contract previously made by them with the plaintiff on the same day for the sale of 200 tons of sugar at an advanced price; neither was the plaintiff aware that D. and Co. were the shippers of the 200 tons which he had contracted to take from B. and Co. The plaintiff, immediately after making the above contracts with B. and Co. and D. and Co. respectively, entered into binding contracts for the sale of the identical quantities of sugar agreed to be sold to him, and upon identical terms, except that the sale was at an advanced price which left the plaintiff a clear profit. D. and Co. advised their Hamburg forwarding agents that they had sold 400 tons of sugar for Bristol, and directed them to obtain and ship the necessary number of bags to that port, and to send the bills of lading to London as soon as possible. The whole of the

sugar not having arrived at Hamburg at the time of the departure of the steamer, D. and Co.'s forwarding agents at Hamburg shipped 3900 bags only, and advised D. and Co. of this short shipment, proposing to send the 100 bags short-shipped by the next steamer. The 3900 bags so shipped were consigned to "Order, Bristol," and the agents, in accordance with the ordinary course of business between themselves and D. and Co., duly forwarded the bills of lading indorsed in blank to certain bankers in London, who were instructed to deliver them to D. and Co. against cash payments of the amount of the invoices, being the price paid by D. and Co.'s agents to the manufacturers upon delivery. No appropriation was, or indeed could be, made of any specific bags under the above contracts at the time of shipment, but the whole 3900 bags were shipped in one undistinguished mass, consigned simply, "Order, Bristol." With this sugar on board, the ship left Hamburg on the 3rd of February, and on the following day went down with her cargo. Before intelligence of the loss, D. and Co., in due course, took up the bills of lading, and then proceeded to apportion the 3900 bags, appropriating 2000 of such bags to B. and Co., and the remaining 1900 to the plaintiff, and making out invoices accordingly, and so as to comply with the terms of each contract. The invoices were then posted by D. and Co.; but prior to that time both they and the plaintiff had had intelligence of the loss of the sugar. Thereupon the plaintiff, anticipating that the 200 tons of sugar coming to him under his contract with D. and Co. might have been despatched on board the ship, although without any specific advice of such shipment, declared on the ship under his floating policy in respect of these 200 tons. Upon receipt of the invoices, the plaintiff and B. and Co. respectively paid D. and Co. for the amounts named in such invoices, and obtained the bills of lading of the sugar invoiced to them under their respective contracts. Thereupon B. and Co. made out and forwarded his invoice to the plaintiff, who paid what was due from him to B. and Co., and received in return the bills of lading for the 3900 bags so invoiced. The plaintiff then also declared upon his floating policy for this further loss:—*Held*, that inasmuch as the plaintiff was liable to pay for the sugar, lost or not lost, he had such an insurable interest as would entitle him to recover in respect of the loss under a policy on "goods." *Stock v. Inglis* (App.), 52 Law J. Rep. Q. B. 356.

Judgment of Field, J. (52 Law J. Rep. Q. B. 30), reversed.—*Ibid*.

THE JOURNAL OF JURISPRUDENCE.

THE DEVELOPMENT OF THE TEACHING OF LAW IN THE UNIVERSITY OF EDINBURGH.¹

IN taking my place for the first time as a teacher in the Faculty of Law in the University of Edinburgh, I think it may not be unsuitable if, in my introductory lecture, I give a short account of the history of the teaching of Law in this University; but before proceeding to this duty, it is perhaps right that I should publicly acknowledge my gratitude for my appointment to the Lectureship on Civil Procedure in the Law Courts of Scotland—(1) to the Law Faculty; (2) to the Senatus of the University; and (3) to its Court, and to express the hope that I may be enabled to realize their expectations in the conduct of the Class.

The University of Edinburgh was founded in 1583, but it was not till 1590 that any attempt was made to found a Chair of Law. In that year the sum of £300 a year, as interest upon a capital sum of £3000, was provided by the Town Council of Edinburgh for the maintenance of a "Professor of the Laws." This sum of £3000 was contributed, as very naturally it should have been, in sums of £1000 by each of—(1) the Lords of Session; (2) the Faculty of Advocates; and (3) the Society of Writers to the Signet, as three separate parties. The Chair thus founded was not occupied, however, by any one who lectured on Law, for what reason is not clear; and ultimately in 1597, after two appointments, the Chair, even in name, was abandoned, and the endowment for it was otherwise disposed of.

It was not again till 1707 that anything was done to promote the teaching of Law in the University. In that year, however, Queen Anne issued an order bearing upon the expediency of establishing and settling "a foundation for a Professorship of the

¹ This paper formed the subject of Mr. Coldstream's introductory lecture in the Lectureship in the University of Edinburgh on Civil Procedure in the Law Courts of Scotland, delivered in the Public Law Class Room on 27th October 1884.

Public Law and the Law of Nature and Nations." For the endowment of this Chair £150 was obtained by altering the disposition of a grant of £300 per annum made by King William, and Charles Areskine was appointed Professor. It seems doubtful if Mr. Areskine ever taught his subject, and he is said to have used his salary in studying law at Utrecht. He had a distinguished career at the Scotch Bar, and attained the dignity of Lord Justice-Clerk.

From 1734 to 1779, there are four gentlemen named as occupants of this Chair, viz. William Kirkpatrick, George Abercrombie, Hugh Blair, and James Balfour of Pilrig. It seems to have been looked upon as a sinecure by all these gentlemen, little or no work being done in it. The emoluments of the Chair were often more than £300 a year, and it was conferred upon the person who could buy out the holder, the Lord Advocate apparently being privy to the transaction. Thus Abercrombie is said to have paid £1000 for it to Kirkpatrick, while Maconochie, the sixth holder of the Chair, paid Balfour the sum of £1522, 18s. 2d. for it. Maconochie (the first Lord Meadowbank) held the Chair for seventeen years, and though an able man, of discursive knowledge and originality, he could only command a very small class, and he only lectured for two sessions. He was succeeded by Robert Hamilton, a Principal Clerk of Session, who held the Chair for thirty-five years, but never lectured. The class hitherto had been deemed a failure, one cause assigned for this being that the Chair had been held by men rising into and in large practice, who treated their academical position and duties as of minor importance. From 1831 to 1862, the Crown made no appointment to the Chair; but the Commissioners of 1858-62 having "ordained that the Professor of Public Law shall deliver a course of not less than forty lectures on International Law during the public session of the University yearly, and to the Professorship shall be attached a salary of £250, to be annually voted by Parliament," a Commission was on 15th May 1862 issued by Queen Victoria in favour of James Lorimer, LL.D., advocate, the present holder of the Chair. Attendance on his lectures being necessary for the LL.B. degree, as also for admission to the Faculty of Advocates, secures a good class, and no longer can the Chair be considered a failure, which it was held to be fifty years ago. The salary of the Chair is now £400 per annum, £150 of Bishops' rents having been restored to its emoluments by a recent decision of the Court of Session.

As before mentioned, the Chair of Public Law was founded in 1707, but only in name, as the first and other holders of it seem to have eschewed lecturing; and there being no other University provision for the teaching of Law, it appears to have been the practice of those desiring to qualify themselves as lawyers, both before and after that date, to resort to the Universities of Utrecht, Leyden, Groningen, or Halle for their

necessary legal instruction. In 1558, Bishop Reid by his bequest had made provision for a College of Arts and Law, but nothing came of it. It is true that some of the Advocates, towards the close of the seventeenth century, gave legal instruction by lectures in their own houses; and we are told that John Spottiswoode, Advocate, and Keeper of the Advocates' Library, who had obtained his legal education at Leyden, "had the honour of being the first who opened schools in his own house indeed for teaching professedly the Roman and Scottish Laws, which he continued to teach at Edinburgh, though not in the University for six-and-twenty years."¹

Another of the extra-mural lecturers was James Craig, who, in 1710, after some years of lecturing extra-murally, was elected by the Town Council Professor of Civil Law in the University; but at first, and for seven years, no salary was assigned to him. In 1716, however, a salary of £100 per annum was provided by the town out of the Ale and Beer Duties, under the Act 3 Geo. I. cap. 5. Craig continued to lecture till 1732. He was a member of the Riccarton family, and his notes for his lectures are still faithfully preserved in the library of the family seat. Craig was succeeded by Thomas Dundas, a member of the Arniston family, and he appears to have been a jurist of some note, as he was known to Continental writers. He resigned the Chair in 1745, and was succeeded by Kenneth M'Kenzie of the Delvine family. He had been over twenty years at the bar, and had studied at Leyden. Robert Dick was the next occupant of the Chair, having been appointed in 1755; and he held the office till 1796, although in 1792 John Wilde was appointed joint-Professor with him. During Dick's tenure of office, the example of the Chair of Civil Law in Glasgow was followed, and the lectures were given in English—they having formerly been given in Latin. In 1799–1800, Wilde was incapacitated, in the view of the Senatus, from properly discharging the duties of the Chair; and on their representing the matter to the Town Council, an arrangement was made between the Faculty of Advocates and the Town Council, by which Wilde was to draw the salary, but a joint-Professor was appointed to do the work. Alexander Irving succeeded Wilde in 1800, and occupied the Chair till 1826, when he was elevated to the Bench under the title of Lord Newton. Irving had recommended, in his evidence before the Royal Commission, the abolition of the class in Pandects, which had always been slightly attended, and his successor, Douglas Cheape, who took office in 1827, abolished the class, and gave only one course, viz. that on the *Institutes* supplemented from the *Corpus Juris*. Cheape also abolished the oral examinations in Latin. He resigned the Chair in 1842 from feeble health, the Faculty of Advocates recording "their high sense of the very able and efficient manner in which he had

¹ Chalmers' *Life of Ruldiman*, 1795, p. 35.

discharged the duties of the Chair." Archibald Campbell Swinton of Kimmerghame, who still survives, was the next occupant of the Chair, and he held it till 1862, when he was succeeded by James Muirhead, Sheriff of Chancery, the present Professor.

The next Chair to be established in the Faculty of Law was that of "Universal History." The Town Council founded it in 1719, assigning a temporary endowment of £50 a year to it. The order of Council making the Professorship may be read, even at this late date of growth of intelligence, with interest and instruction. It is as follows: "Considering the great advantages that arise to the nation from the encouragement of learning by the establishment of such Professorships in our College as enable youth to study with equal advantages at home as they do abroad, and considering the advantages that arise to this city in particular from the reputation that the Professors of the liberal Arts and Sciences have justly acquired to themselves in the said College, and that a Profession of Universal History is extremely necessary to complete the same, this Profession being very much esteemed, and the most attended of any one Profession at all the Universities abroad, and yet no where set up at any of our Colleges in Scotland," etc., they agree "that a Professor of Universal History be established in the College of this city." Mr. Charles Mackie, Advocate, was the first holder of this office. He was afterwards styled "Professor of Universal Civil History, and Greek and Roman Antiquities." He devoted part of his course to lecturing upon the "Law Procedure of the Ancients." The patronage of the Chair was virtually placed in the hands of the Faculty of Advocates by the Act of 1721, which also provided for the payment of £100 per annum to the holder of the office. The Chair is now known as that of "Constitutional Law and History."

Charles Mackie occupied the Chair for forty-six years, but for the last twelve years of his tenure he had the assistance of a joint-Professor to teach the class. Mr. John Gordon, and subsequently Mr. William Wallace, held the office. When Mackie resigned in 1765, John Pringle was appointed Professor; but it is said that for twenty years prior to 1780, the lectures of the Chair had been discontinued. There is reason to believe that the salary was not regularly paid during this time.

In 1780, the teaching of the Chair was resumed by Alexander Fraser Tytler, who in that year was appointed joint-Professor with Pringle. His lectures were afterwards published under the title of *Elements of General History*, in which were described "the condition of society and the progressive state of mankind from the earliest ages to the beginning of the present age." There is evidence to show that in one of his best years only thirty students attended his class. He was raised to the Bench in 1801, under the title of Lord Woodhouselee, and was succeeded in the Chair by

his eldest son, William Fraser Tytler. We are told that he also failed to obtain a class of any size, seventeen students only attending his class in 1806-07, and for seven sessions he did not lecture at all. His lectures having been read for him during his last session of tenure by his brother, Patrick Fraser Tytler, the historian of Scotland, he resigned the office in 1821, having previously been appointed Sheriff of Inverness-shire. He was succeeded by Sir William Hamilton, Bart., in 1821. His occupancy of the Chair was by no means congenial to him. His limited class of about thirty led him to petition the Senatus to give "protection" to the Chair by admitting the subject to the Arts curriculum; but he was not encouraged in his suit, and he afterwards brought his views before the Royal Commission, stating that in Germany from "twelve to twenty different historical courses are delivered to audiences more numerous than those in almost any other department of knowledge." The Commissioners, however, recommended the abolition of the Chair. In 1833, the city having become bankrupt, the salary of the Chair ceased to be paid. Sir William gave up lecturing, and in 1836 he was transferred to the Chair of Logic and Metaphysics, which he so much adorned for so many years. He was succeeded in the Chair of History by George Skene, who afterwards became Professor of Law in the University of Glasgow. From 1842 to 1846, the Chair was occupied by James Frederick Ferrier, and on his election as Professor of Moral Philosophy in the University of St. Andrews, Cosmo Innes, Advocate, afterwards Principal Clerk of Session, was appointed. He was a master of History. At first he lectured gratuitously, and so long as he did so, he had a large class. When afterwards he demanded the usual fee, he is said to have had a mere handful of students. He then lowered his fee, but no one came; and on returning to his original practice of free attendance, his benches were filled. But as his class proved unremunerative, he ceased to lecture. In 1862, however, the University Commissioners made attendance on the lectures of the Chair necessary for the LL.B. degree. They ordained it as the "Chair of History," and to belong to the Faculty of Law as well as the Faculty of Arts. Innes then resumed his lectures, and he secured a good class till his death in 1874. He was succeeded by Aeneas J. G. Mackay, LL.D., Advocate, who occupied the Chair till 1881, when he retired owing to the engrossing nature of his official and private practice at the Bar. As the learned author of the most valuable treatise on the *Law and Practice of the Court of Session* of the present day, he deserves an honoured reference in the introductory remarks of the first occupant of the Lectureship on Civil Procedure in the Law Courts of Scotland. Professor Mackay was succeeded by John Kirkpatrick, LL.B., Advocate, now the energetic Dean of the Faculty of Law.

In 1722, the Chair of Scots Law was founded by the Town Council of Edinburgh. This they did upon the petition of

Alexander Bayne, Advocate, a gentleman who had previously been lecturing upon the subject outside. He represented to the Town Council "how much it would be for the interest of the nation and of this city to have a Professor of the Law of Scotland placed in the University of this city, not only for the teaching the Scots Law, but also for qualifying of Writers for His Majesty's Signet;" and the Council "being fully apprised of the fitness and qualification of Mr. Alexander Bayne of Rives, Advocate, to discharge such a province, elect him to be Professor of the Law of Scotland in the University of this city." The salary of £100 was paid out of the Ale Duty. Bayne occupied the Chair till 1737, and is known as the author of *Institutions of the Criminal Law of Scotland*, and another book on *Municipal Law*. He was succeeded by John Erskine, who as an enthusiastic teacher of the subject had a larger class than Bayne. Like his predecessor, he used Sir George Mackenzie's *Institutions* as his text-book, till the publication of his own *Principles of the Law of Scotland* in 1754, which thereafter was the basis for his lectures. Erskine occupied the Chair for twenty-eight years, when he resigned. He died in 1773, after employing the last years of his life in the completion of *The Institutes of the Law of Scotland*, which was published after his death in 1773. It is not necessary to remind you, but it is certainly just to Erskine to remark here, that this has ever since been regarded as a book of the highest authority on the Law of Scotland, and after a lapse of more than 100 years I find the present Professor of Scots Law in the Syllabus of his Lectures for 1884-85 says: "The Lectures have special reference to the writings of Mr. Erskine, and students are strongly recommended to make themselves familiar either with his *Principles*, editions by Wm. Guthrie, Edin., or his *Institutes*, edition by J. Badenoch Nicolson, Edin., 1871," a just tribute to the value of the great labour of one of the greatest jurists the University has ever produced.

Erskine was followed by William Wallace, Advocate, in the occupancy of the Chair. He was known as Collector of the Decisions of the Faculty of Advocates from 1772 to 1776. He died in 1786, and was succeeded by David Hume, who at the early age of twenty-eight was made Sheriff of Berwickshire, probably through the influence of his father, John Hume, whose property of Nine Wells was in the county. He was afterwards Sheriff of Linlithgowshire, and a Principal Clerk of Session. When holding the latter office, he was the colleague of Sir Walter Scott, who says: "I copied over his lectures twice with my own hand from notes taken in the class; and when I have occasion to consult them, I can never sufficiently admire the penetration and clearness of conception which were necessary to the arrangement of the fabric of law formed originally under the strictest influence of feudal principles, and innovated, altered, and broken in upon the changes of times, of habits, and of manners, until it

resembles some ancient castle, partly entire, partly ruinous, partly dilapidated, patched, and altered during the succession of ages by a thousand additions and combinations, yet still exhibiting the marks of its antiquity and symptoms of the skill and wisdom of its founders, and capable of being analyzed and made the subject of a methodical plan by an architect who can understand the various styles of the different ages in which it was subjected to alteration. Such an architect has Mr. Hume been to the Law of Scotland, neither wandering into fanciful and abstruse disquisitions which are the more proper subject of the antiquary, nor satisfied with presenting to his pupils a dry and undigested detail of laws in their present state, but combining the past state of our legal enactments with the present, and tracing clearly and judiciously the changes which took place, and the causes which led to them." As a lecturer, we are told Hume had a high reputation. But he never published his Lectures, and he specially prohibited their publication by his executors after his death. He published, however, a work of great learning on the Criminal Law of Scotland, and collected a volume of Decisions which was published after his death. On Hume's promotion to be a Baron of Exchequer in 1822, he resigned the Chair, and was succeeded by George Joseph Bell, Advocate, who was appointed a Principal Clerk of Session in 1832. To name George Joseph Bell to an assembly of lawyers, is to bring to their remembrance a flood of recollections of the many times he has solved their difficulties, eased their labours, and sent them from their research with a light and joyous heart. His *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence*, and his *Principles of the Law of Scotland*, published as text-books for his students, will ever be a monument to his worth as a jurist and teacher of Law. Jeffrey had predicted for him a place on the bench, and it is said that he would have likely been the means of securing this for him had there been a vacancy. Cockburn writes: "Certainly no man had ever a stronger claim, so far as such claims depend on eminent fitness, than Mr. Bell had for a seat on that bench, which his great legal work had been instructing and directing for above thirty years." John Schank More was the next and sixth Professor of Scots Law, having been appointed to the Chair in 1843. The son of a Seceding minister in North Shields, he was born in 1784, admitted Advocate in 1806, and in 1827 published an edition of Erskine's *Principles*, and in 1832 an edition of Stair's *Institutions*, with notes and illustrations. He was an interesting lecturer and pains-taking teacher, a profound lawyer, and a great collector of books, his library consisting of 15,000 volumes.

The next occupant of the Chair was George Ross, Advocate, who took office in 1861, and held it for the brief period of two years. He was admitted to the Bar of Scotland in 1835. He edited many volumes of *Leading Cases* as well as Bell's *Law Dictionary*. As

a Professor I remember him lecturing to a large class, which I fear proved too much for a not over-vigorous frame, as he died prematurely in 1863, mourned by a large circle of acquaintances and friends.

Ross was succeeded by George Moir, Advocate, the choice of a unanimous vote of the Faculty of Advocates. He, however, only held the Chair for two years, and then resigned.

In 1865, Norman Macpherson, Advocate, Sheriff of Dumfriesshire, was elected Professor of Scots Law, and still holds the office.

In 1807, eighty-five years after the last erection of a Law Chair, the Faculty of Law was again enriched by another Professorship, viz. that of "Medical Jurisprudence and Medical Police." In 1798, Dr. Duncan, Professor of the Institutes of Medicine, memorialized the Town Council on the subject, stating that he had been in the habit of lecturing upon it once a week, and recommended the formation of a Professorship. This move was said to be in the interest of his son. The Senatus, having been asked for their opinion, condemned the proposal, and gave it as their opinion that the "multiplying of Professorships, especially on new subjects of education, does not promise to advance the prosperity or dignity of the University." Nine years afterwards, however, the Town Council and the officers of the Crown were able to procure a Commission from George III. creating a "Professorship of Medical Jurisprudence and Medical Police, as taught in every University of reputation on the Continent of Europe," with an endowment of £100 a year out of the Bishops' Rents, and appointing Dr. Andrew Duncan, junior, to be the first Professor. It is said that, although originally proposed to the Town Council by his father, it was the son who had called the attention of the Medical Faculty to it, and thus the real originator of the Chair was the first to hold it. His residence and study in Continental University towns, on the completion of his medical studies at home, had evidently inspired him with the utility of the study of "State Medicine," the name given by the Germans to this branch of science. The Chair, however, was not admitted as part of the regular compulsory medical curriculum till 1833, although in 1825 it was made an optional alternative class for the M.D. degree. This was in the time of the third holder of the Chair (William Pulteney Alison having held it for one year), viz. Robert Christison, afterwards Sir Robert Christison, Bart., who in 1822, in his twenty-fourth year, was appointed Professor. At first, Christison says, his students were chiefly young lawyers; and of these he had at first twelve, afterwards five, and then only one. But this did not daunt the young and courageous Professor. Though unremunerative, he continued to lecture; and on the class being made an optional alternative for the M.D. degree, his numbers increased. When he left the Chair, on his election to the Professorship of *via Medica*, he had a class of ninety students.

Christison was succeeded by Thomas Stewart Traill, M.D., in 1832, thirty years after his graduation; and he lectured till within twelve days of his death in 1862, in his 81st year, having occupied the Chair for about thirty years.

The next Professor of Medical Jurisprudence was Douglas MacLagan, M.D., who is the present occupant of the Chair.

In 1825, the Chair of Conveyancing was added to the Faculty of Law. There seems to have been some difficulty made about its creation even by the Society which afterwards was anxious for its foundation. It seems that, in 1750, the institution of the Chair was strongly urged by some members of the legal profession. The Society of Writers to the Signet, however, strongly resisted it, as it would interfere with the duties of masters to their apprentices. In 1793, however, they had got other light upon the subject, and they instituted a Lectureship on Conveyancing, not, however, in the University. In 1796, the Society tried to get the Lectureship erected into a Chair in the University, but both the Senatus and the Faculty of Advocates successfully opposed this move, on the ground that it would interfere with the class of Scots Law. The Town Council, however, in 1825, erected the Chair in the University, the Society of Writers to the Signet providing the salary of £100 per annum.

The first Professor was Macvey Napier, who in 1816, seventeen years after he had passed W.S., had been appointed Lecturer on Conveyancing by the W.S. Society. He had, previous to his appointment as Professor, attained considerable reputation as a man of letters and a critic, and was in later days appointed editor of the *Edinburgh Review* in succession to Jeffrey. He died in 1847, at the age of seventy, and was succeeded by Allan Menzies, W.S., who had as a student greatly distinguished himself in the Arts classes. In later years, as Clerk to the Trustees of the Dick Bequest, and visitor of their schools, he did much to put the education in the counties of Aberdeen, Banff, and Moray in the high state of efficiency for which they have for many years been distinguished. As a family practitioner, he had a large and lucrative practice made by himself. As a lecturer he had a large class of attentive students, who profited greatly by the system of written examinations in the class, without notes or books, which he was the first to introduce. He suffered much from deafness, and it may have been owing to this infirmity that he adopted a plan of examination which is now universal, and conduces so much to the proper acquisition of every University subject.

His lectures were characterized by great literary taste. They were published after his death, and have gone through two or three editions. Like so many distinguished lawyers, he was the son of a Scotch manse, where he learned that conscientious regard for duty, and acquired those habits of conduct and hard work, which, while they placed him at an early period of his life in

honour and a high position in his profession, also contributed to his death at a comparatively youthful age.

In 1856 he was succeeded by Alexander Montgomerie Bell, W.S., for long a partner of the well-known legal firm of Dundas & Wilson, W.S. In this business he acquired that extensive and accurate knowledge of Conveyancing which made him rank as a teacher of consummate ability. His Lectures were published by his son after his death, and are now the leading text-book on the subject. The labours of an anxious Conveyancing business, combined with those of a very largely-attended class, proved too much for a not over-robust constitution; and I well remember him in his later days coming to his class-room, where his lectures were read by his son, in a very exhausted bodily condition. Such labours cut short a beautiful life and a gentle spirit; and on his death in 1866, James Stuart Fraser Tytler, LL.D., W.S., a member of a family who had done much for the teaching of Law in the University of Edinburgh, as we have already seen, in former days, was appointed Professor of Conveyancing, and still holds the office.

One other Chair remains to be noticed in tracing the history of the teaching of Law in this University, and that is the "Chair of Commercial and Political Economy and Mercantile Law."

This Professorship was founded in 1871 by the Merchant Company of Edinburgh—£10,000 being appropriated by it for the purpose of founding a Chair in the University, the teaching from which would be valuable for future merchants, out of the surplus funds coming into their hands from a redistribution of certain educational endowments under their control. The tenure of office, however, is only for seven years, with eligibility for re-election. The step thus taken seems to have been looked upon by the Merchant Company as an experiment. In the result hitherto, however, it must be deemed a success. The Curators and the Master and Treasurer of the Merchant Company were fortunate in securing for the first occupancy of this Chair, William Ballantine Hodgson, who already as an economist, an educationist, and lecturer, had established a well-merited reputation. His class during his first six years of tenure averaged fifty students. He was reappointed on the expiry of the seven years of his tenure, and on his sudden death from heart disease in 1880, the present Professor, Joseph Shield Nicholson, was elected for a period of seven years.

And thus Law has come to be taught—partly because of the foresight of the Crown, the patrons, or their advisers, and partly because of the necessity created, as evinced by attendance on the extra-mural lectures of some enterprising citizen. The growth has been slow, and sometimes the patrons for the time being, or their advisers, have not read aright the signs of the times. It does not seem much to have established only seven Chairs for the

teaching of so large and important a subject during a life of 300 years. But Law is proverbially slow and uncertain in its development and operations, and so we must be thankful that since 1707, when Public Law was founded; to 1710, when Civil Law was founded; to 1719, when the Chair of History was founded; to 1722, when the Chair of Scots Law was founded; to 1807, when Medical Jurisprudence was founded; to 1825, when Conveyancing was founded; to 1871, when Political Economy and Mercantile Law was founded; we have now seven Chairs established in the Faculty of Law in the University of Edinburgh, and that its legal curriculum is more complete than that of any other University in the kingdom.

But comparatively complete as it is, the University authorities by the Faculty of Law, the Senatus and the University Court have proclaimed by my presence here to-day that in their opinion the curriculum can be made more complete still, and this remark leads me now to explain how it is that a lectureship on Civil Procedure in the Courts of Law in Scotland has been instituted in this University, and how I have come to be the first exponent of this branch of legal lore.

The University of Edinburgh confers three degrees in Law, viz.: the degrees of LL.D., LL.B., and B.L.

The first of these is conferred *honoris causa* by voice of the Senate on such persons as in their opinion merit the distinction by their writings, or research in the various branches of science and learning, and every year at the April graduation a number of such degrees are conferred. This was the only degree in law till, by an ordinance of the then University Commissioners in 1862, they instituted the degree of LL.B. The candidates for the degree must be graduates in Arts of a Scotch, English, or Irish University, or of some other University approved by the Senatus and University Court. They require to attend a course of study in Law over three academical years, and must attend (1) a course of at least sixty lectures in Civil Law, Scots Law, and Conveyancing;¹ and (2) a course of at least forty lectures in Public Law, Constitutional Law, and Medical Jurisprudence. The examination for the degree extends over all these subjects.

This degree so wisely instituted was not, however, popular, and for these reasons probably—(1) it was not the only necessary portal for admission to practice in any branch of the profession; and (2) because the mass of Law students do not take the degree of M.A., as, early in life, they are engrossed in the work of an office, and have not time for other than legal studies at a University. And thus it came about that only twenty-four gentlemen

¹ By an Order of Her Majesty in Council, dated 11th August 1884, attendance may be given on the Class of Commercial and Political Economy instead of the Class of Conveyancing.

graduated as LL.B. between 1864 and 1872, and in 1873 no one at all. The University authorities accordingly instituted a new degree, viz. B.L., which they thought would be more largely taken. For this degree, unless an M.A., a candidate only requires attendance on one course of study on the Faculty of Arts in a University, as for the degree of LL.B., but must pass a satisfactory examination in—(1) Latin; (2) Greek, French, or German; and (3) any two of the following subjects: Logic, Moral Philosophy, and Mathematics. He requires to study Law at least two academical years in the University of Edinburgh, and must attend the classes of Civil Law, Scots Law, and Conveyancing, and any one of the classes of History, Public Law, and Medical Jurisprudence. This degree has now been taken during nine years by twenty-three gentlemen, while thirty-four gentlemen have during the same period taken the degree of LL.B. It would thus seem that the new degree in the first decade of its existence had not been more popular than the superior degree of LL.B. in its first decade, while the latter has attained an increased popularity of nearly fifty per cent. The institution of the LL.B. degree would, however, seem to have stimulated to degree-taking in Law, as the period before 1874 only produced twenty-four Law graduates, while the number since has been fifty-seven. Let us hope that the next decade will show as great, if not a greater, ratio of increase.¹

It is not unworthy of notice that increased degree-taking in Law is contemporaneous with possible reward for the labour thus incurred. The first premium for degrees in Law was instituted by the Edinburgh University Endowment Association in 1878. In that year they founded a fellowship of £100, tenable for three years. It is open to holders of the LL.B. or L.B. degrees of not more than five years' standing, and is awarded to the competitor "who shall present the best thesis on a subject comprised within the course of study required for the degree of LL.B. in the University." It will be observed that for the six years before 1879, the average number of gentlemen taking a Law degree was 2·0, while since 1879 and the founding of University Fellowship, the

¹ TABLE SHOWING NUMBER OF GRADUATES IN LAW FROM 1864 TO 1884.

LL.B.			LL.B.			L.B.		
1864,	.	1	1875,	.	1	1875,	.	1
1865,	.	1	1876,	.	1	1876,	.	1
1866,	.	4	1877,	.	2	1877,	.	2
1867,	.	1	1878,	.	2	1878,	.	1
1868,	.	2	1879,	.	1	1879,	.	7
1869,	.	1	1880,	.	4	1880,	.	6
1870,	.	6	1881,	.	7	1881,	.	2
1871,	.	6	1882,	.	3	1882,	.	2
1872,	.	2	1883,	.	8	1883,	.	0
1873,	.	0	1884,	.	5	1884,	.	1
1874,	.	1						
<hr/>			<hr/>			<hr/>		
25			34			23		

average has been 7·4. I suspect in learning, as in everything else nowadays, the question, Will it pay? *quod meruit?* is the turning-point for making any exertion, effort, or acquisition; and the possibility of becoming the holder of a fellowship of £100 per annum for three years is sufficient inducement to study for a degree, which otherwise in itself is of little practical benefit. It is right I should here mention, as a factor in the history of the teaching of Law, the lectures of the first, and till now the only, holder of this fellowship, viz. Mr. John Ferguson M'Lennan, M.A., Aberdeen, Advocate, who during his tenure of the fellowship delivered a course of lectures on the "Law of Contract," which were free to those who attended, and I am glad to say the attendance was large.

The Vans-Dunlop Scholarships, recently founded, should also stimulate to degree-taking.

I have said that the degrees in Law are in themselves of little practical value. I should qualify this remark by stating that the degree of LL.B., though not an essential, still admits to the profession of Advocate without further examination; while not essential, still the same degree and that of B.L. admits to the profession of Law Agent, provided an examination on the Practice of the Courts is passed to the satisfaction of the examiners under the Law Agents Act.

Now it was found that gentlemen who held the degree of LL.B. or B.L. failed to pass on this subject before the Law Agents' examiners, and the Faculty of Law very naturally felt aggrieved at their graduates being found disqualified upon it. The subject is really part of the course of Scots Law, just as Conveyancing was supposed to be so in days gone by; but the Professor admits that he has not time to teach it. The Faculty accordingly resolved that there should be separate teaching upon it; and at their request, with the sanction and approval of the Senatus and Court of this University, the subject begins to be taught to-day within the walls of this University as a separate and distinct branch. You will pardon any apparent egotism if I now for a few moments take up your time, by telling you how it comes about that I have been selected to expound it.

By the Law Agents Act of 1873, and relative Act of Sederunt, it is required of every applicant for admission to the office of a Law Agent in Scotland to pass an examination *inter alia* on Forms of Process. This includes Procedure in the Inferior as well as Superior Courts of Scotland. Now as a matter of fact, at the time of the passing of the Act, the last treatise on the subject of Practice in the Court of Session was that by Sir Charles Farquhar Shand, whose book was a most valuable one; but having been published in 1848, prior to the passing of the very sweeping reforms in Practice accomplished by the 1850 and the 1868 Acts, it was very misleading to any one studying the subject.

The consequence was, that students had the greatest difficulty in getting information on the subject; and although few questions on it were put, the examiners had in very many cases to refuse to pass applicants in their Law examination, by their failure in this branch.¹ It has been said, as it was of Conveyancing of old, that knowledge on this subject should be obtained in the chambers of practitioners in Edinburgh. The answer to that is simply this, that of late years Court Practice has had a tendency of concentrating in a few legal firms, and they could not possibly receive all applicants; while the Court Practice of smaller businesses is far too limited to give any idea of the very many *modi operandi* embraced in the term Forms of Process.

Prior to the passing of the Act referred to, I had become in 1872 officially connected with the Supreme Court, and shortly after the Act came into operation, from my supposed knowledge of the subject, from the many cases I saw, I was frequently applied to for information, while I was early led to see how great was the need of proper teaching on the subject. Some of the examiners, too, and specially Dr. Carment, spoke to me of the difficulty they had in passing applicants on Procedure; and as the result of a conversation I had with him in the spring of 1875, I resolved to give a course of lectures on "The Law and Practice of the Court of Session." I accordingly gave a short course as preparatory for the April examination of that year. Nine students were enrolled as members of my class, and I was glad to learn that every one of these successfully passed the examination on the subject a few days thereafter.

During the next three or four years I continued to lecture with varied success in Edinburgh and Glasgow, having classes of from seven to forty-six students. At the request of some of my students, I published a handbook on Procedure in 1878; and as this could be got for a smaller price than the amount of my fee, I did not consider it necessary to lecture again till 1882-83. During these intervening years, however, I had many applications to know if I was not going to lecture, and I accordingly intimated

¹ The critic of Mr. Black's "The Law Agents Act, 1873, etc.," in the *Journal of Jurisprudence* of March 1884, says:—"As forms of process are not included in the curriculum for the degree, a Bachelor of Laws may be absolutely ignorant of the mode in which legal proceedings require to be conducted in this country. Surely the public are entitled to expect that every person admitted to the monopoly of Court practice shall have some knowledge of those forms of process on which the rights of the lieges frequently depend." "We confess that in our opinion the examiners do not at present put as many questions on 'Forms of Process' as are necessary to afford a fair test of the knowledge of the candidates." While Mr. Black himself says, at p. 187 of his book: "It will be with an anxious heart that not a few receive the Court of Session questions from Mr. Jamieson's hand, for to most of our Scottish youth this part of their legal education is only acquired by persistent cram; and as only four questions are propounded, there is very reasonable ground for fear that in the course of cram something important enough to be embodied in a question may have passed unnoticed in the wilderness of regulations, Acts of Sederunt, and Court of Session minutiae, etc."

in the beginning of the session 1882-83, that if a sufficient number gave in their names, I would resume the course. About thirty students gave in their names, and out of these I opened a class of twenty, to whom the hour fixed was suitable. In the following session, 1883-84, I had only a class of four, the smallest I ever had, the reason for this being, I was told, that having on the advice of my professional friends raised my fee to £2, 2s., it was thought too much for a twenty-lecture course.

It is true, more literature on the subject of my course now exists than was the case some years ago. In the Practice of the Supreme Courts, Dr. Mackay's book will ever stand as a monument to his labour, learning, and skill in preparing a very exhaustive treatise on the subject, while Mr. Spinks' book and my own handbook will be found useful as books of ready reference.

In the Practice of the Inferior Courts, Sheriff Dove Wilson and Sheriff Lees' volumes will give most, if not all, needful information on the subject. But one and all of these books have been patent to students for five or six years now, and still the examiners for the Law Agents' Examination say there is deficiency on the part of candidates in this branch of study. They, too, along with the Professors of Law in the University, desire that it be systematically taught, and hence, after extra-mural teaching of several years, I, as the only lecturer on the subject, am appointed to intra-mural teaching, and have the very responsible and arduous duty of organizing this branch of legal study in this University.

For the first time, so far as I am aware, Civil Procedure is taught in a University in this kingdom. It is, however, a common class in the Universities of Germany, where it is taught sometimes as a special branch by a Professor of the subject, and sometimes as part of another course. I can see no reason why it should not be specially taught in this country, where the necessity for its knowledge is as great.¹ It is not the first time, as we have previously observed, that we have copied the Germans in their advance in learning. True, there are now books upon the subject; but experience proves that special cram from books for an examination immediately following, is apt to give very superficial knowledge, and is not enough, even for the examination itself, much less for the after necessities of professional life. For such the mind requires to be filled with, and drilled in, the information slowly and gradually, and accustomed by oft-repeated reference to the details of the subject, to feel thoroughly at home in it.

¹ In Lord Moncreiff's address on "Legal Education," to the Juridical Society in 1870, he says: "It is of the greatest consequence, to whichever branch of the profession the student intends to belong, that he should be thoroughly armed with the forms before he begins, for there is nothing so painful as learning them afterwards; and whether he practise at the bar or behind the bar, he will find the greatest possible advantage from having all his forms at his finger ends."

I have hitherto spoken of the subject of my course, and referred to it in terms signifying your knowledge to some extent of its nature and scope.

Allow me, however, in my closing remarks to open up the subject a little to you, and explain to you generally the province of this Lectureship.

In the class of Scots Law, the student is instructed upon the rights of parties in their various relations to others, and in property heritable and moveable; and as a foundation for my subject, it is highly expedient that a student know what rights can be enforced. It is at this point that the utility of this class comes in. You learn for example, in the class of Scots Law, that given certain circumstances, a contract is constituted or made; that two or more persons have rights which they can enforce. But here you are left in darkness, and you must find out for yourselves how obligation is to be enforced if the contract is not peaceably fulfilled. And so the teaching of this class comes to your aid and tells you to what tribunal you are to resort; what form your action is to take; what pleas you are to maintain; how you are to conduct it; what defence will be stated; how and when it will be made; and how you are to arrange your forces, and carry on the battle from field to field, till you quit as victor in the fight; and then how you will obtain the costs of the war, and implement or damage for the breach of contract. Most of these details are either regulated by Statute or Act of Sederunt (*i.e.* an order of the Lords of Council and Session), or they are subject to decision of the Court. So far as time permits, it will be my endeavour to make you acquainted with one and all of them, and so picture to you each likely battle-field, that when you enter it in actual professional life, you will have some idea of what it is, and be able to bring up your forces and carry on the fight as will enable you to come off conquerors; or if you lose, that it may be, not because of want of knowledge of the law or legal tactics, but because your clients have not hearkened to your wise and better counsels, when you advised those things which make for peace.¹

THE LORDS AND CONSTITUTIONAL LAW.

POLITICS have no place in this *Journal*, and any subject which bears however remotely upon the present political crisis may seem to be improper to these pages. But the action of the House of Lords in regard to the Franchise Bill has given rise to a distinct question of constitutional law and precedent, and no question of home or foreign law is, it may be assumed, unsuitable

¹ For material help in the historical part of this Lecture, it is right I should acknowledge my obligations to the "Story of the University of Edinburgh," by Sir Alexander Grant, Bart.

for discussion in a legal journal. We shall express no opinion upon the wisdom of the proposed Franchise Reforms; we shall pronounce no judgment upon the conduct of the Peers in rejecting the Franchise Bill. We shall address ourselves to the strictly legal question: whether or not the action of the Peers has involved a breach of constitutional law.

The right to dissolve Parliament is a privilege which has always been inherent first in the English and subsequently in the British Crown. From the earliest years of our Parliamentary history, it has been in obedience to the call of the Sovereign that Parliament has assembled, and in obedience to his will that Parliament has been prorogued or dissolved. Since the Revolution, however, that right has generally been exercised by the Sovereign in accordance with the advice of his responsible ministers; and accordingly, as our constitution is at present adjusted, whilst the power to dissolve Parliament is in the Crown, the duty of deciding when that power shall be exercised, in normal circumstances, devolves upon the Government of the day.

By no vote of either House of Parliament or of both Houses combined, is it possible directly to enforce an appeal to the people. Nevertheless, it is practically in the power of either House of Parliament to render a dissolution imperative. By refusing to vote the necessary supplies for the public service, the House of Commons can at any time render the conduct of the government of the country impossible, and thereby compel the Ministry to appeal to the country. There can be no doubt that such action upon the part of the House of Commons, unless taken in self-defence in response to unconstitutional action upon the part either of the Crown or of the Government of the day, would be wholly unconstitutional. The House of Lords has it equally in its power to compel a dissolution of Parliament by refusing to pass the necessary money bills, but it is clear that its conduct in doing so would incur a like censure, as being a distinct breach of constitutional precedent.

But there are other means by which, without any breach of the constitution, either House of Parliament can compel the Government of the day to appeal to the people of the country. This is the practical effect of a hostile vote upon any matter of vital importance.

In this respect there is a difference between the two Houses, that the Government is much more sensitive to the action of the House of Commons than to that of the Upper Chamber. A vote of censure or of no confidence in the Lower House renders it impossible for the Ministry longer to conduct the government of the country, but no such result flows from a similar vote in the House of Lords. It is only when the House of Lords rejects a measure which the Government regards as urgent and vital, that a dissolution becomes inevitable.

We have said that either House can enforce a dissolution by thwarting the Ministry, but this is not strictly accurate, and that for two reasons :—

I. It is not in the power of either House directly to compel the Ministry either to resign or dissolve. Remedies indeed there are for an outraged Parliament,—impeachment, or an address to the throne praying for the removal of Ministers,—but these are extreme measures and hardly relevant to the present discussion. Technically there is nothing to prevent a Ministry retaining office for years in defiance of the majority of either or both Houses of Parliament. So far as regards the House of Commons, however, this is practically impossible. According to our Constitution, the will of the majority of the people of the country is supreme, and whatsoever action interferes with that will must be unconstitutional. The House of Commons are the representatives of the people and the recognised exponents of their will, and the Government which set itself against the House of Commons would place itself in opposition to the will of the people, and by consequence would act unconstitutionally. To many indeed it has appeared that this theory of our constitution leaves no room for a Second Chamber, that an Upper House which is in opposition to the House of Commons must be in opposition to the people. But the position of an Upper Chamber which opposes the Lower is totally different from that of a Government which defies the popular assembly, and the difference lies in this very fact that the Government can, and the Upper Chamber cannot, appeal to the people. It is always open to the Upper Chamber to say: This House of Commons has lost touch with the people, we refuse to regard it as an exponent of the national will. The Government, on the other hand, cannot take this ground and yet refuse a dissolution; a question between a Government which refuses to dissolve and the House of Commons must always be a question between the Government and the country. The action of a Ministry which would persist in retaining office under such circumstances would be unconstitutional, and in this extreme case the House of Commons would probably be justified in compelling a dissolution, by rendering government impossible. The relation of the Ministry to the House of Lords is on a different footing, for it has never been regarded as unconstitutional for a Government to retain office which does not command the confidence of the Upper Chamber. The only way in which the House of Lords can compel the Ministry to dissolve is by rejecting a Government measure of first-class importance. Even then more than one course is open to the Ministry, for they may consent to postpone the measure and so delay the dissolution; but if, on the other hand, they regard its enactment as vital and urgent, and the Peers be firm in their opposition, they must resign or else dissolve Parliament and appeal to the people.

II. There have been many instances in which a defeat of the Ministry in the House of Commons, and a consequent change of Government, have been attended by no dissolution of Parliament; but the boundary lines of political partisanship are at present too clearly defined to render such an event at all likely in the immediate future. In like manner there would be no technical difficulty in the way of a change of Ministry without an immediate dissolution in the event of the defeat of a Government measure by the House of Lords; but the very occurrence of such an event presupposes an antagonism between the majorities of the two Houses, and it would be impossible for a new Ministry which commanded a majority only in the Upper House, long to continue the government of the country.

The question now remains, and it is really the question which is at present at issue, "Is it unconstitutional on the part of either House of Parliament to compel an appeal to the people by thwarting the Ministry?" Now, if the conduct of the House which adopted such a course were dictated solely by a desire to force a dissolution, and had no reference to the merits or demerits of the proposals which were rejected, there cannot, we conceive, be any doubt that such action would be a breach of the unwritten law of our Constitution. The privilege of the Crown acting upon the advice of its responsible advisers to dissolve Parliament is no mere technical or formal right, but a real prerogative which lies at the basis of our Constitution. The conduct of a Chamber which should directly or indirectly arrogate the right to dissolve Parliament would be just as intolerable a breach of the Constitution as would be the conduct of a Sovereign who should refuse to call Parliament together and attempt to govern without a Parliament.

These considerations seem very much to narrow the question at issue. We have pointed out that it would be unconstitutional upon the part of the Upper House to reject a money bill with the view of forcing a dissolution of Parliament, and equally unconstitutional would be its action in rejecting any other measure, not because the majority of the House disapproved of the measure itself, but because they were determined to compel an appeal to the people on some other wholly irrelevant issue. Such, for example, would be the action of a Chamber which should refuse to pass a measure admittedly necessary for the enforcement of law and order in Ireland, in order to compel the Government to appeal to the country on its colonial policy.

There would seem to be in certain quarters a disposition to push this doctrine much further, and to insist that wherever the action of the Upper Chamber, no matter by what motive that action may be dictated, shall have the effect of compelling the Government to appeal to the country, the action of that Chamber must be unconstitutional. Because the right to dissolve Parliament or to fix the time for a dissolution is not a prerogative of

the Upper Chamber, therefore the Upper Chamber has no right to take any action which may have the effect of rendering a dissolution necessary. But it is scarcely necessary to point out that such reasoning leads directly to the result that a second Chamber is an anomaly. If the Upper House is to pass a measure of which the majority of its members disapprove, simply because a refusal to pass such a measure would lead to a dissolution, it follows that the Upper House must pass without question all Government bills of first-class importance. But to the supporters of the Upper House, in both political parties, it has always appeared that one of the chief functions of a second chamber is to secure that measures, in regard to the expediency of which wide divergence of opinion exists, shall not be passed into law without an opportunity having been afforded to the people to pronounce their deliberate verdict upon them. The immediate effect of the rejection of such a measure may be a dissolution of Parliament. It devolves upon the Government to determine whether or not their proposals will bear postponement. If they think not, then they must dissolve. No doubt this action is forced upon them by the conduct of the House of Lords, and in this sense it is true that the House of Lords has dictated the time for a dissolution. But surely it would be idle to pretend that the Peers by doing so, by rejecting a measure which they could not conscientiously pass, had been guilty of any breach of constitutional privilege. Even the case of the man who through fear of death is all his lifetime subject to bondage, would be less painful and pitiable than that of an assembly subject to the bondage of inability to obey their consciences in case such conduct might precipitate a dissolution of Parliament.

Enough has perhaps been said to show that the key to this constitutional question is to be found in the motives which actuate the Peers themselves. If inspired by a desire to force a dissolution upon some irrelevant issue or upon the general conduct of the Government, the House of Peers took occasion to do so by the rejection of a measure of which the majority of that House approved, there can be no doubt that such action would be a serious breach of the Constitution, and indeed an encroachment upon the prerogative of the Crown. It would make no difference whether the measure which was made to serve that purpose were a routine money bill or a measure involving a great constitutional change. In either case its rejection would be made to serve an unconstitutional purpose. On the other hand, it is impossible to characterize as other than gross extravagance the contention that the Peers are guilty of an infringement upon the constitution whenever, by the rejection of a measure of which they disapprove, they compel the Government to appeal to the people. Such a doctrine, if carried into effect, would make the legislative action of the second Chamber a mere farce.

Now to apply this for one moment to the present crisis, without attempting here to draw any conclusion or pronounce any verdict. It would seem to follow from what has been indicated, that if the majority of the House of Peers think it wise and just that the Franchise Bill should pass in its present form, but have nevertheless determined to reject it in order to compel the Government to take the opinion of the country at this juncture upon their general home and foreign policy, then, undoubtedly, the House of Peers is guilty of an attempt to infringe upon the Constitution. But if, on the other hand, the majority of the Upper House are of opinion that it is not in the best interests of the nation that the Bill should pass in its present form, and are therefore determined not to pass it, and thereby to compel the Government to take the judgment of the country upon their proposals at an early date, then, in that case, it is neither just nor reasonable, nor indeed rational, to accuse the House of Lords of unconstitutional action.

THE ORIGIN AND HISTORY OF THE HIGH COURT OF JUSTICIARY.—No. III.

THE fall of a horse near Kinghorn, on a winter's evening in 1286, not only cost Scotland her king, but ere many years led to changes far wider in their extent. When Alexander III., a few years before his death, found that his young granddaughter Margaret alone remained of all the Celtic royal family, he, as a precaution, summoned a great assembly of the nobles at the ancient capital of Scone, where the Maid of Norway was formally acknowledged as heiress to the throne, and probably it was due to the king's foresight that, after the accident which deprived him of his life, Margaret was accepted as Queen of Scotland, apparently without question, and guardians of the realm seem to have been duly appointed, amongst them being Comyn, Earl of Buchan, a member of that family in which the office of Justiciar of Scotland had so often been held. Amongst the dignitaries of State whose names are recorded as having been present at the Assembly or Parliament held at Briggeham, in 1289, there is found along with Comyn William de Soulys, whom we know to have been Justiciar of Lothian eight years before, so that in all probability the high office was fully represented at this great convention of notables, called to discuss the proposed marriage of Margaret and Edward Prince of Wales (afterwards Edward II.). In the records of this National Council at Briggeham, Edward I. is styled "Seygnur of Yrelaund," and certainly it is remarkable that the dignity of Robert de Brus in relation to his Annandale possessions is similarly expressed, "Seygnur de val de Anaunt." This form of expression conveys some idea of the despotic and supreme power exercised at the time by these barons over their own immediate feudal depend-

ants, especially where Norman influences had full play, and the Bruces, patriotic as they undoubtedly became, were at the outset purely Norman, with no small tendency to submit to Norman overlords in the persons of the English kings. Justiciars in this view, unless they were actually great barons themselves, or immediately related to them, could have little power save in the burghs or over the domains held directly from the Crown. In theory at least these great barons were of course subject to the king's officers, but the means of enforcing this subjection were absent, and recourse could be had only to the dangerous experiment of employing the arms of one feudal lord against another. Probably by the time of the Briggeham Assembly, even in Gallo-way, the ancient code recognizing the system of pecuniary penalties and compensation for crimes had in great measure died out. No doubt at one time Scotland from end to end lived under no other law than this, which prevailed especially as we know in the early customs of Wales, but by the end of the thirteenth century great changes had taken place. Men might still have, according to their degree, a relative value, but the law no longer fixed the price, and taxed each injury, great or small, according to a precise scale.

As late as about 1264, we find among the imperfect fragments of the sheriff's accounts in Exchequer, William (Stewart) Earl of Menteith rendering in his official capacity as "*quondom vice-comes de Air*," an account of his receipts and disbursements, and appending a memorandum that he "*habet filium Gilaueriani, qui fuit firmarius de Cumberays in obsidem pro fine quam fecit dictus Gilauerianus cum domino rege de iiiij^{xx} vaccis quousque dictas vaccas persoluerit*." The "*firmarius*" was a person holding land direct on lease from the crown, and may therefore have been, in remote islands like the Cumbraes, possessed of local influence and power. The fine inflicted upon him was so heavy that perhaps it may indicate some remains of a system of compensation for homicide, and the forcible detention of his son as a hostage by the sheriff, points to a determination to exact the full penalty fixed by the King's justiciar. When we remember that in 1263 Haakon, King of Norway, lay off Cumbrae with his fleet before the disasters which destroyed his expeditionary force, it is easy to imagine homicide of the king's subjects committed by the islanders in the course of pillaging forays, in which they may have been overawed into joining the Norsemen, of whose kingdom the Cumbraes had once formed a part. A fine was a rough and ready way of administering justice, even in matters criminal, which would not easily pass out of use, especially as it was also a means of producing valuable additions to the royal revenue. When in civil or quasi-criminal offences a fine was found to be so convenient, it would need a greater advance in civilisation than ever the thirteenth century beheld, not to have taken advantage of and extended so lucrative a device. Such an offence as the marriage of Robert de Brus the

elder to the Countess of Carrick, without the permission of King Alexander asked or obtained, was, to take one of many instances, a sure occasion for replenishing the royal coffers; and in the case of grave crimes, the very extent of the compensatory payment was a temptation to continue a system to the evils of which men's eyes were already beginning to be opened. Thus it was that at the time of Alexander the Third's death the courts of the king held by his justiciars and sheriffs (vice-comites) were not only self-sustaining, but also yielded valuable profits. Probably it may be said, without risk of over-statement, that the fines and escheats derived from these courts were only second in importance to the revenues of the crown lands, whereof the greater and more valuable portion was still situated "between Forth and Spey."

We have attempted to show, from the scanty evidence left us, how possibly, as the older law fell into disuse or disrepute, some efforts were made to substitute a more regular system of judicial supervision over crime; but even at the close of what may be called the Celtic period, these had advanced only a short way beyond the initial stages. Even then, probably, our ideas of what constitutes evidence would, if enforced, have proved fatal to the attempt to administer justice according to the rudimentary system still prevailing. The accuser swore solemnly to the truth of what he stated when he charged another with a secret crime, but the defence was not made by the production of evidence to disprove the accusation; those who knew the facts weighed not with the court as compared with "compurgators," who swore along with the accused to his innocence, and who were selected as neighbours and as well acquainted with the parties to the suit. As we have seen, however, a criminal caught red-handed met with a summary treatment which dispensed with form or order of procedure.

Again, the trial by ordeal, so well known in France, England, and other countries as a mode of dealing with crime, existed in Scotland also, probably in all its varied forms. Thus, for example, there were assigned to some of the great religious houses, along with grants of jurisdiction, the privilege of holding ordeals by water, by hot iron, and by duel. The trial of crime by assize or jury had gradually replaced this older method, in itself probably derived from an external source, although while the accused had now to thole an assize, and the ordeal by battle was a thing of the past, nevertheless the expressions and terms originally referable and appropriate to judicial duel still survived. In country districts, at the end of the thirteenth century, there appear to have been distinct local magistrates, taking their names from the locality,—"*Judex*" of Levenax (Lennox), Anegus (Angus), etc. These persons may or may not have been appointed by the king,—perhaps he merely approved of the selection made by the feudal baron,—but in any case they represent the numerous class we know as "*judices regis*," and were to be found in various districts during the preceding century.

The development of the religious houses—which, by the way, have in their registers preserved to our day most valuable information as to the contemporary state of Scotland—greatly aided the cause of order, and though by their exemptions and special privileges and jurisdictions they would, along with their dependants, not at first fall under the authority of the royal judges, yet their existence, as organized bodies of persons who were, generally speaking, opposed to the feudal exactions and oppressions of the barons, must have tended to produce a widening respect for religion and the orderly obedience to the law it inculcated. In the National Assembly of 1289, the increased number of abbeys and priories is well represented—Kelso, Melrose, Dunfermline, Arbroath, Cambuskenneth, Cupar, Dryburgh, Newbattle, Balmerino, Glenluce, Kilwinning, Culross, Dundrennan, Kinloss, Deer, Iona, and others appear by their abbots, while Coldingham, Kincardine, May, Canonby, Blantyre, and other houses sent their priors. It will be further noticed that few of these ecclesiastics come from far and outlying places, or indeed from what might properly be styled the Highlands, and there is strong reason to think that in those early and purer days of the Church, its progress was really synonymous with the advance of stable government and the exercise of the law upon offenders.

The King in Scotland down to the time of the Succession Wars, not only in name but in reality, was the supreme criminal judge. He did not of course always, perhaps not even often, go round to the various places where the justiciars held their “ayres,” but it is remarkable that the royal progresses, of which from the Sheriff’s Accounts we can trace the course, were frequently coincident with the holding of these Courts which met three times a year in the chief burgh of each district, if not in every shire. Alexander III. was in the constant habit of moving about from one part of his dominions to another, and though beyond the scope of our present inquiry, many curious items among the payments made for the king’s household and expenses seem to lift in some small degree the veil of obscurity which hangs over the manners and customs of the Celtic Court. We are not at present, however, troubled to know that deer were kept at Stirling and a foxhunter paid to destroy vermin there, or that Crail possessed rabbit-warrens near by its royal castle; but it is more to the point to remember that probably the Justice Ayres were held in nearly all those places where the sheriff’s accounts show the king to have been from time to time resident. Again, the names of the principal strongholds in Scotland, twenty-three in number, are given in the list of garrisons surrendered by John Balliol to Edward I., and most of these also, it may be fairly concluded, were places at which the justiciars held their Courts. The enumeration is as follows:—Roxburgh, Jedburgh, Berwick, Dumfries, Kirkcudbright, Wigtown, Ayr, Dumbarton, Stirling, Edinburgh, Dundee, Cluny, Aboyne, Forfar, Kincardine, Aberdeen, Cromarty, Ding-

wall, Inverness, Nairn, Forres, Elgin, and Banff. But the Exchequer Rolls supply us with a positive means of assurance as regards the circuits actually made by the justiciars at this time, because these high officers had to account to the king's officers and auditors for monies received by way of fines at the various places they visited for judicial purposes. We have already seen that as early as 1258 a Justiciar for Galloway had been added in the person of John Comyn to those already established for Scotland and for Lothian, so that there must have been over Scotland from this time, excluding Argyll and the Isles, three officers perambulating their districts, and holding criminal courts, besides, no doubt, dealing also with civil causes.

Of these, Alexander Comyn, Earl of Buchan and Justiciar of Scotland (Proper), already mentioned as such in this narrative, makes a return of the income and outlay of his office thus: "*Computum de receptis et expensis suis factis de officio justiciarii post ultimum computum suum usque in hunc diem.*" The date of the account is somewhere between 1262 and 1264, and the Justiciar enumerates the places whence there were "*lucra acquisita,*" thus giving us practically the various seats of his Circuit Court. The places named are Inverness, Invernairn (where it is known from another source that a royal residence formerly existed), Forres (where, though white kid gloves were not yet invented, nevertheless there seems to have been a maiden circuit), Elgin, Banff, Aberdeen, Kincardine, Forfar, Perth, and Fife, this district probably being represented by the palaces or royal residences which we know existed at Crail and Dunfermline as well, no doubt, as by such towns as Cupar and perhaps Culross. The sum thus levied by the Justiciar is stated to have attained the respectable amount of £405, 3s. 5d., no inconsiderable return at a time when the king's household expenses during a year and a half only reached the total of £2224, and the queen's £795, 16s. 6d. Moreover, when the great difference in the value of money is reckoned, the importance of the judicial source of revenue is still further enhanced.

Again, taking the Justiciarship of Lothian, these Exchequer Rolls enable us to trace out the circuit route of Stephen of Flanders, whom we know to have held that important office in 1259, and who must have resigned it about 1264, since he is described as "*quondam justiciarius*" in the accounts. Ayr, Lanark, Peebles, and Roxburgh are enumerated as seats of the Court, whilst a year later, in 1265, Hugo de Berkeley as Justiciar includes in his return the towns of Berwick, Edinburgh, Dumfries, Dumbarton, and Stirling. From a payment "*Magistro Petro cementario ad operacionem castri de Dumfries per vice-comitem de Lanerk,*" the duties of a Justiciar apparently at this time embraced the repair and upkeep of the "*strengthis*" or strongholds of the king, and possibly it was in the interest of the State,

for the due security of prisoners, that they exercised in this way such functions as more modern legislative wisdom has assigned to Her Majesty's Prison Commissioners. Hugo de Berkeley was, like many of the leading barons of his day, somewhat of a pluralist, since, at the same time as he acted as Justiciar, he was Sheriff of Berwick. This fact leads us some way towards the conclusion that if the Sheriff's decisions were liable to review they were not probably appealable to the Justiciar on circuit, who may perhaps have confined his jurisdiction in matters criminal to the pleas of the Crown already known as such.

In Galloway "Willelmus de Sancto Claro" was Justiciar in 1288, his style being "Justiciarius Galwythie;" but the district must have been an unprofitable one, and perhaps the fines could not readily be exacted, for the "lucra" forming the gross product of his exertions only amounted to £9, 1s. 8d. His circuit centres are not named, but the money was raised in two districts "ultra" and "citra" aquam de Hur (Water of Urr). Kirkcudbright and Wigtown, which respectively enjoyed the presence of a bailie and a sheriff, and perhaps Maxwelltown in the same district, already connected by a still existing bridge with the adjoining county of Dumfries, may be named as probable centres for the Justiciar's visit. William de Sancto Claro (St. Clair) was at this time also Sheriff of Dumfries, and a person of the same name occurs as Sheriff of Edinburgh in 1288.

The collection of these fines imposed by the Justiciars was, as we have already pointed out, not at all an easy matter, especially in turbulent and rebellious districts such as Galloway, and the entries in the Sheriff's accounts repeatedly allude to the difficulty of obtaining payment. By virtue of early grants for the support of the Church in various places, percentages were paid over to certain ecclesiastical dignitaries or foundations. These varied from an eighth to a tenth; and we find, for example, that Stephen of Flanders, in his return for each of the places he visited, gives the "lucra acquisita cum octava episcopi Glasguensis," and similarly with others allusions to these deductions occur. How the Justiciars conducted the business of their Courts there is little to show. It is well known that no trace whatever exists of any official corresponding to the Lord Advocate until a much later period—indeed even a century after the accession of Robert the Bruce, a public prosecutor was unknown. At the same time, one statute of Alexander III. indicates that practitioners of some kind had come to be recognised by the Courts, "statuimus quod in placitis nostris nullus loqui audeat de hoc quod tangat causam nisi tantummodo actor et reus aut eorum advocati." The expression may be commended to those who desire to trace back the ancient Faculty of Advocates to remote antiquity, and to assign to the Bar of Scotland a pedigree stretching out even to the days of our Celtic kings.

In 1290, the forethought of Alexander III., in providing for the due succession of his daughter Margaret to the throne, was rendered of no avail, for the young queen, "The Maid of Norway," died in the Orkneys, on her way to take up the sceptre of her ancestors. It is not necessary to dwell upon the confusion which followed, or the way in which, by a reference to King Edward I. of England, ultimately John Balliol was chosen from among his competitors to be King of Scotland; but one of his very first steps was taken in the direction of extending to Argyll that judicial system already prevailing over the rest of Scotland. There does not appear to have been up to this time for that district, which included most of the country lying west of the great Drumalban range, any judicial system such as we have noticed elsewhere. No Justiciar includes it in his fiscal itinerary, no sheriffs existed to render their accounts and dispense justice locally, so that John Balliol was doing a great deal to aid the efficient administration of the laws when, in 1292, he passed in his first Parliament at Scone an Act to assimilate the district of Argyll and the principality or kingdom of the Isles to the rest of Scotland in matters judicial. Three sheriffdoms were created—one in Skye, another in Lorn, and a third in Kintyre, and in each case the lands to be embraced are described by a reference to the principal owners. Thus, the sheriffdom of Skye was to include "*terra comitis de Ross in Nort Argail*," or what is now Wester Ross, being the ancient possessions of the religious establishment at Applecross, secularised in the hands of the family of Macintaggart, whose very name indicated their priestly descent; under the same sheriff also were Glenelg, with the Crown possessions of Skye and Lewis, Eigg, Rum, Uist, Barra, "*cum minutis insulis*." The Sheriffship of Lorn embraced Morvern, the Lordship of Lorn, and the possessions of various landowners, including the Earl of Menteath for Knapdale, "*terra Anegus filii Dovenaldi Insularum et terra Colini Cambel*," the last being ancestor of the Argyll family, and the former, son of Donald, Lord of the Isles. Lastly, Kintyre was to embrace under one sheriff that peninsula with the "*Insula de Boot*" (Bute). This Act of John Balliol completed for Scotland, except in the extreme North, where Norse customs still prevailed, a judicial division into districts. No doubt the duties of the Sheriffs were in the main those of fiscal officers collecting revenue for the Crown, but certainly they also acted as local judges, and were intimately connected with the Justiciars and their circuits. It is impossible now to learn how far there may have been any resemblance in the offices and duties of the sheriffs and those "*judices*" of whom such frequent mention is made in the earlier Acts that have come down to us, but that is a question only remotely connected with the origin of our present Supreme Criminal Court, since the duties certainly at that time could not have resembled in any way those performed later by the

Justiciars. What is termed the "old extent" was truly a valuation made by the Sheriffs at assizes held by them for the purpose, chiefly during the reign of Alexander III. It embraced all but the church lands, and formed a basis for taxation; but as occasion required re-valuations were made, and we know from the Exchequer Rolls that one instance of this at any rate had occurred before the death of the Maid of Norway in 1290. There can be no doubt that during at least a century before the War of Succession there had been a growing tendency on the part of large proprietors to arrogate to themselves powers now confined to the Supreme Criminal Court; and evidence is not wanting that the Kings of Scotland were fully aware of the encroachment on their sovereign rights, and sought to curb it. As early as 1180, Bishops, Abbots, Barons, and Earls were forbidden to hold their own courts, without a sheriff or his servant being summoned; and an express reservation was made of the Crown pleas "of revising of women, of reff, of byrning, and of murthir;" and the Statute concluded, "Item yar has no baroune leyff to hald court of lyf and lym as of judgement of bataile or of water or of het yron bot git ye schireff or his serviand be yar at to see gif justice be truly kepit yar as it aw to be." From time to time, as the power of the Crown grew, the checks upon hereditary as well as upon territorial jurisdictions would be increased, but the confusion and troubles into which Scotland was plunged at the end of the 13th century no doubt enabled many of the Barons again to assert rights of life and death over their dependants. From John's first Parliament there were four notable absentees, who are denounced as defaulters, and bidden to do homage—Robert de Brus, Earl of Carrick; Donald, the son of Angus of the Isles; John, Earl of Caithness; and William Douglas—and we know from the proceedings of the next Parliament, held at Stirling in 1293, that one at any rate of these defaulters was defying the king's officers, and arrogating to himself independent power of life and limb. William Douglas is there summoned to answer a charge against him of having laid hold of the king's "ballivi," who by order of the Justiciar had proceeded to Lanark, and of having forcibly detained them a night and a day in his castle. He was also accused of having imprisoned three persons in his castle at Douglas "*contra leges usitatas in Regno Scocie*" until one of them died, whilst he caused another to be beheaded, the third alone escaping. Amongst those who rendered homage to Balliol was John de Soulis, and this renders it the more probable that the Justiciar here mentioned may have been William de Soulis, who was the holder of that office in 1281, and was present at Briggeham in 1289. As we shall have now to refer to the attempted intrusion of Justiciars from England by Edward I., it may be convenient at this stage to give a list of these officers prior to the English invasion as complete as we have been able to make it.

<i>Justiciars of Scotland.</i>	<i>Justiciars of Lothian.</i>	<i>Justiciars of Galloway.</i>
	1142 David Olifard	
	1178 Walter Olifard	
1227 William Comyn, Earl of Buchan	1222 Walter Olifard (yr.)	
1241 Philip de Melville } Richard de Monte } Alto }	1247 William Olifard	
1248 Alan Durward	1248 D. de Grahame (acting)	
1253 Alexander Comyn	1259 Stephen of Flanders	1258 John Comyn
	1264 Hugo de Berkeley	
	1281 William de Soulis	1288 William de Sancto Claro

With these names the earliest stage of our inquiry closes, and we enter upon a period during which began that development of a system of administration in matters relating to crime, which ultimately gave us a High Court of Justiciary much akin to that we now possess.

DR. JOHNSON AS A LEGAL ADVISER.

DR. JOHNSON'S contempt for the Scottish nation did not prevent him from lending his assistance to a Scottish lawyer, and acting in an amateur capacity before our Courts. Johnson's contributions to our legal literature are certainly not without interest, and several of the cases in which he assisted are rather characteristic specimens of eighteenth century litigation before the Court of Session. That Johnson had talents which might have ensured his own success as a professional lawyer can hardly be doubted. He was remarkable above all things for a calm judgment and uncommon sense. He took special delight in arguing upon one side of any question which might chance to be started in the course of casual conversation, and he always argued well. We feel, moreover, as we read the minute reports which the faithful Boswell has recorded, that with equal ease and plausibility he could have replied to all that he himself had urged. In fact, the view which he advanced depended very much upon the manner in which the discussion opened. The line of argument which he adopted towards Scotland and things Scottish is due, perhaps, mainly to the fact that the subject was often started by conceited Scotsmen, and to an irresistible temptation to torment Boswell. In addition to his love of and skill in conducting an argument, Johnson's vast stores of information and zeal in acquiring it would have been of immense service to him as a professional man. On the other hand, his constitutional indolence and irregular habits might quite possibly have doomed him to professional obscurity. According to Boswell, Johnson did at one time contemplate the study of law, although, as this was at rather a mature period of life, it is not probable that he had any intention of making a profession of this science. What he did intend we may

perhaps gather from a prayer, which after his custom he composed and committed to writing, entitled "Prayer before the Study of Law." In that prayer, which his biographer very properly describes as truly admirable, he asks for the ability "to attain such knowledge as may qualify me to direct the doubtful, and instruct the ignorant, to prevent wrongs, and terminate contentions." We wish it could with truth be said that this was the ambition of every lawyer. He had apparently at an earlier period of his life acquired some knowledge of law, just as he had learned something of medicine. "On my expressing my wonder," says Boswell, "at his discovering so much of the knowledge peculiar to different professions, he told me, 'I learnt what I know of law chiefly from Mr. Ballow, a very able man; I learnt some, too, from Chambers, but was not so teachable then.'" Johnson, indeed, was one of those men so filled with a love of information that every kind of knowledge was welcomed by him.

For Scottish lawyers he seems to have had a considerable amount of respect. In fact, Boswell writes to him in one place, "You rate our lawyers here too high when you call them great masters of the law of nations." Not only do they escape the lash of his satire, but certain individuals of this class seem to have made no small impression upon him. He was much pleased, we are told, with Monboddo, whom he went out of his way to visit. Speaking of Kames, he said, "The Scotchman has taken the right method in his *Elements of Criticism*; I do not mean that he has taught us anything, but he has told us old things in a new way." His *Sketches of the History of Man* were more than once the subject of Johnson's criticism. He gave Sir David Dalrymple (Lord Hailes) as the subject of a toast before he knew him personally, and was highly pleased with him when they subsequently met in Edinburgh. All readers of the *Journal* will recollect the collision, as Boswell calls it, into which Johnson came with old Lord Auchinleck. But the venerable judge held his own, and silenced Johnson by his query as to Mr. Durham's "excellent commentary on the Galatians." Johnson could not fail to be struck with the liberal range of studies which were pursued by these members of our College of Justice. The contemporaneous English bench did not certainly boast of such philosophers as Kames and Monboddo, nor of such an historian as Hailes.

Johnson not only appreciated our judges, but he had a favourable word for the mode in which our cases were conducted. "The English reports," he said, "in general are very poor, only the half of what has been said is taken down, and of that half much is mistaken; whereas, in Scotland, the arguments on each side are deliberately put in writing, to be considered by the Court. I think a collection of your cases upon subjects of importance, with the opinions of the judges upon them, would be valuable." The old-fashioned pleading certainly proved of assistance to the law

reporter, as may be seen by a reference to the Faculty Collection which formed the "Current Series" of that day. But, unfortunately, the opinions of the judges do not seem to have been readily available, and the argument too often occupies the space which one would like to see filled with the grounds of judgment. But that Johnson should admire these learned and sometimes elegant compositions which then adorned every process, was natural enough. It may surprise us, however, that he should have ever assisted at their manufacture. Boswell is so associated with Johnson in his London haunts, and so constantly to be found in that city with apparently nothing to do save to listen to his great friend's words of wisdom, and take a note of them, that it is difficult to realize that all the time he was carrying on a profession in Edinburgh. But an examination of the biography will show that the dates of Boswell's annual departures from the Metropolis correspond with those at which the Parliament House became awakened to life and bustle after the spring and autumn vacations. Probably Boswell was not oppressed with much business. As a judge's son and junior of Auchinleck, he was in those days bound to have some. But although no fool, not without learning and fairly practical, he was hardly the man to make much impression upon the "canny writer chieils" of the Outer House, and his frequent journeys to London must have formed in their eyes a species of dissipation which was not quite compatible with a steady attention to business. Had he contented himself with high jinks in an old town tavern it might have been different. The majority of his brethren probably viewed Boswell with mingled feelings of contempt and envy. For while they might despise his intellectual weakness, he possessed an acquaintance with the great world of London—"that great theatre of life and animated exertion," as he calls it—such as few amongst them could boast of.

Johnson, we learn, went twice to the Parliament House, having visited it on his way to the Hebrides, and again after his return. Upon the first occasion it was vacation, and he wandered about the library with "good Mr. Brown the keeper." When he afterwards witnessed the place during Session, "he thought," we are told, "the mode of pleading there too vehement and too much addressed to the passions of the judges." He forgot that these fifteen old men did sit as a jury, although a jury in whom age had, it is to be hoped, subdued all passions.

We must return, however, to the subject of Johnson as a legal adviser. Several of the cases, with regard to which he was consulted by his friend Boswell, seem to have been rather absurd, and worthy of a place in the *Court of Session Garland*. Take for example that of Dr. Memis, who brought an action of damages against the Royal Infirmary of Aberdeen, because in an authorized translation of their Latin Charter into English they had rendered

a term, when applied to him, *Doctor of Medicine*, and elsewhere translated it *Physician*. He maintained that he would suffer patrimonial loss, as the public might suppose he was something different from and inferior to a physician. It says a good deal for Aberdeen society in the eighteenth century if it examined so critically any translation from the Latin, and was prepared to weigh so carefully each expression used. Lord Auchinleck had thrown out this action as groundless, and it was after it had been appealed to the whole Court that Boswell, who was supporting his father's interlocutor, called for the aid of Johnson. It was fairly a question for a scholar, still better for a medical man, to decide. Johnson did consult one of the latter, for he wrote to Dr. Lawrence, "the learned and worthy," to ask whether "*Doctor of Medicine* is not a legitimate title, and whether it may be considered as a disadvantageous distinction?" Armed with an opinion to the effect that in England, at all events, the title was really the highest which a practitioner could expect or claim, he was able to dictate to Boswell an argument of which the style is truly characteristic. Thus he begins, "There are but two reasons for which a physician can decline the title of *Doctor of Medicine*, because he supposes himself disgraced by the doctorship, or supposes the doctorship disgraced by himself;" and again, "That in calling him doctor a false appellation was given him, he himself will not pretend, who, at the same time that he complains of the title, would be offended if we supposed him to be not a doctor."

"A few days afterwards," says Boswell, "I consulted him upon a cause, *Paterson and others against Alexander and others*." The case, which recalls that abomination of past days an unreformed municipality, related to the corporation of Stirling. The Court of Session had decided that this body was corrupt in respect of the evil doings of an influential minority of its members. Apparently Boswell was called upon to support the judgment of the Court below before the House of Lords. This is Johnson's way of putting the argument: "There is a difference between majority and superiority; majority is applied to number, and superiority to power; and power, like many other things, is to be estimated *non numero sed pondere*. Now, though the greater number is not corrupt, the greater weight is corrupt, so that corruption predominates in the borough, taken *collectively*, though perhaps taken *numerically* the greater part may be incorrupt. That borough, which is so constituted as to act corruptly, is in the eye of reason corrupt whether it be by the uncontrollable power of a few or by an accidental pravity of the multitude."

Boswell tells us, with reference to another legal argument which his friend supplied to him, that when it was laid before the Lords of Session as part of a document begun and ended by Boswell himself, Lord Hailes had critical sagacity enough to

discover a more than ordinary hand in the *Petition*. This is surely not surprising, nor any striking proof of that judge's acuteness. "I told him," adds Boswell, "Dr. Johnson had favoured me with his pen. His Lordship with wonderful *acumen* pointed out exactly where his composition began and where it ended. But that I may do impartial justice, and conform to the great rule of Courts *sum cuique tribuito*, I must add that their lordships in general, though they were pleased to call this a well-drawn paper, preferred the former very inferior petition which I had written; thus confirming the truth of an observation made to me by one of their number in a merry mood, 'My dear Sir, give yourself no trouble in the composition of the paper you present to us; for indeed it is casting pearls before swine!'"

Boswell consulted Johnson in another case even more ludicrous than that of Dr. Memis. We are told the sage laughed heartily over it. It seems that about 1781 the Sheriff Court procurators in Edinburgh procured a charter, and adopted the title of solicitor as more genteel. In doing so they excited the mirth of the *Caledonian Mercury*, in the columns of which reference was made to a contemplated charter for the Cadies of this city, who had been encouraged by the singular success of their brethren of an *equally respectable* society. Impertinent the article no doubt was, and very unpleasant for the new-fledged solicitors. But that this wretched joke should have been construed into a libel by any rational Court of Justice is strange indeed. The Lords of Session indeed threw the action out by their first judgment. But according to the absurd custom of that time, a second petition was competent, and when Boswell consulted Johnson it was with the view of preparing an answer to such a petition. What seems to have struck the amateur lawyer forcibly was the indecency of asking the Court to reverse a finding already arrived at. He puts it very well in the following passage: "If every attempt, however light or ludicrous, to lessen another's reputation is to be punished by a judicial sentence, what punishment can be sufficiently severe for him who attempts to diminish the reputation of the supreme Court of Justice, by reclaiming upon a cause already determined, without any change in the state of the question? Does it not imply hopes that the judges will change their opinion? Is not uncertainty and *inconstancy* in the highest degree disreputable to a court. Does it not suppose that the former judgment was temerarious or negligent?" We wonder how the judges relished this expression of English opinion upon the system which they sanctioned. Doubtless the hand of Johnson would be again recognised. Possibly his argument gave offence. At all events it was not successful. Boswell tells us with shame, "that the court, by a plurality of voices, without having a single additional circumstance before them, reversed their own judgment, made a serious matter of this dull

and foolish joke, and adjudged Mr. Robertson (the editor) to pay to the society five pounds sterling money and costs of suit. The decision will seem strange to English lawyers."

We fancy Johnson got rather bored with Boswell's applications for advice in his professional matters. In one place the latter mentions that after a meeting had been fixed for consultation, in the case of Hastie the schoolmaster of Campbeltown, he found Johnson when the day came unwilling to exert himself: "I pressed him to write down his thoughts upon the subject. He said, 'There's no occasion for my writing, I'll talk to you.' He was, however, at last prevailed on to dictate to me, while I wrote as follows." Then follows a really long argument which Boswell was directed to turn over in his mind and make the best use of in his speech before the bar of the House of Lords. In this argument Johnson lays down the questionable proposition, that "children being not reasonable, can be governed only by fear." Hastie had adopted this principle in the exercise of his profession, and been deprived of office in consequence apparently of the success with which he excited fear in the minds of his pupils. The Court of Session had restored him, and the case had found its way to the bar of Lord Mansfield. That learned judge took a different view from Johnson, and in reversing the court below remarked, "Severity is not the way to govern either men or boys."

Boswell was counsel in one of the most interesting and important cases which ever came before the Court of Session. We refer to the lawsuit raised by a negro to establish his liberty in this country. Boswell, as he takes care to tell us, had no sympathy with the anti-slavery movement, then in its infancy. It was otherwise with Johnson, who once gave as a toast, "The next rising of West Indian slaves," and sneered at the "Yelps for liberty among the drivers of negroes." He, therefore, must have assisted Boswell on this occasion with much satisfaction, and doubtless rejoiced at the result of the action.

In most of the cases in which Johnson thus acted as chamber counsel, the points raised involved little technical knowledge for their proper consideration. It is amusing, however, to find him engaged in the composition of a paper upon such a subject as *Vicious Intromission*,—a question, as Boswell truly remarks, purely of Scotch law. It was this pleading which attracted the attention of Hailes as already mentioned. Boswell set Johnson to argue against the relaxation of the older and sterner doctrine of our courts, and to oppose the views expressed by Lord Kames in his *Historical Law Tracts*. Kames was inclined to hold that the law of vicious intromission having originated in barbarous times, was to be toned down when administered in the refined eighteenth century. "Whatever reason," says Johnson, "may have influenced the judges to a relaxation of the law, it was not that the nation

was grown less fierce; and I am afraid it cannot be affirmed that it is grown less fraudulent." This treatise, upon such a subject as *Vicious Intromission*, affords perhaps the best proof of Johnson's genuine affection for his Scottish friend.

Reviews.

An Introduction to the History of the Law of Real Property. Third Edition. By K. E. DIGBY, Barrister-at-Law. Clarendon Press Series. 1884.

THE author of this treatise claims for it the distinction of being the only work on the subject of Real Property Law in England, as developed in the history of that kingdom, looked at from the point of view of the student, rather than of the lawyer; and the claim seems to be fully made out. The book might be presumed, from the fact that it has attained to a third edition within ten years, no less than from its being printed at the Clarendon Press, to be a successful attempt to direct students into and through the mysteries of title and estate; and the presumption is amply borne out by an examination of the contents. The scheme of the work is to start with the earliest period of accessible authority on English land rights, and proceed thence to the period—in Henry the Eighth's time—at which the last really fundamental changes in the law took place. In supplement to this historical survey is added a concise review of the present state of the law of real property in England. And, in every part of the exposition, care is taken to print characteristic extracts from writs, text-writers, and statutes (sometimes with authoritative translations, more frequently without), so as to impress the form of ancient as well as modern legal phraseology and modes of thought on the student's mind. These extracts are prefaced or accompanied with such explanations as seem to be required. No method seems to be better fitted than this to train up the youthful lawyer or lay-student in the way he should go, and to indemnify him for the want of a law library. No exception can be taken to the author's profound admiration for Blackstone, nor to his long excerpts from Glanvil; but few English lawyers would be inclined to give such a large space to extracts from Bracton, who owed at least as much to the Roman law as to English customs, and whose pages are deformed by screeds of Roman law texts shot wholesale into his exposition without much regard to time and place, and without any regard to their authority.

It will be gathered from what has been said that the more valuable part of the book is that which treats of the historical development of English Land Rights. It is a pity that an accurate and careful survey of the state of English land, from the

Conquest downwards, should be prefaced by a statement of Saxon custom which leaves much to be desired. It is true that the author disarms criticism by disowning any claim to antiquarian research. But it requires no great research to suggest a doubt whether at the earliest period of which we have any documentary evidence there existed any such individual ownership in land as is asserted in the first chapter, at least in the sense in which these words are now used. On the assumption that in England the family and the village community ever obtained the same prominent position as in other Teutonic and even in most Indo-European countries, no part of the soil could be regarded as in individual ownership, not even the houses and yards actually inhabited by the family, nor the book land or "bocland," which is shown by the laws of Alfred to have been alienable only in the exceptional case where the "mægburg" or kindred could make no valid objection. It is the more probable theory that individual ownership only came in with, and as part of the conception of, the manor. It is, perhaps, still more astounding to find that in revising a third edition the author has paid no attention to recent researches, which cast a doubt on the existence of free village communities in England at any period of its history of which we have any written evidence. Until Mr. Seebohm's researches are displaced, it will be necessary to admit the existence of villenage and the manor at the most remote period known to us. The universal extension of the manor in Domesday Book, the frequency of the terminations "ham" and "ton" in all parts of Saxon England, and the marked discrepancy between the division of Celtic and Teutonic lands, all point to the same conclusion. No one has ever been able to point out any mode in which a servile tenure could consist with a free village community. Villenage was useful, if not exclusively at least mainly, in the cultivation of demesne lands, and with the conception of such lands the notion of independent hundreds governed by moots disappears. It cannot be denied that the constitution of Courts-baron points back to a time before the rise of manors and servile tenure, but it has never yet been established—the evidence hitherto is all the other way—that that time ever existed in England. It has always seemed to us that the weak point in Mr. Seebohm's thesis lies in his attempt to trace the English manor further back to the usages which rose up on the Germanic borders of the Roman Empire. The author of the present treatise does well to point out that the parts of Germany from which the English came were wholly unaffected by Roman influences. These invaders, in short, probably did not bring the manor with them, but were driven to imitate it from southern types by the exigencies of a war which practically exterminated the natives, and which, from its duration and uncertainty, gave unusual prominence to military leadership.

Speeches, Arguments, and Miscellaneous Papers of David Dudley Field. Edited by A. P. SPRAGUE. 2 Vols. New York: D. Appleton & Company. 1884.

MR. DAVID DUDLEY FIELD was a man of high aspirations and of wide philanthropy. The making of wars to cease throughout the earth was the least of the benefits he hoped mankind would enjoy — to some extent, of course, through his instrumentality — the codification of international law the greatest.

It is as an international jurist that Mr. Field is best known to lawyers on this side of the Atlantic. Along with MM. Rolin-Jacquemyns Bluntschli, Calvo, and others, he assisted in the foundation of the Institute of International Law at Ghent in 1873, while he has from time to time been present in this country at the meetings of the Social Science Association, and has taken a leading part in the work of its legal section. Several addresses delivered before these bodies are to be found in the volumes before us. But Mr. Field's labours have not been confined to one department of legal science. This collection forms a brief extract of the American lawyer's long and busy life; it contains specimens of the work he has done at the bar and in Congress, as well as on the platform and as a pamphleteer. A letter on the *Reform of the Judicial System of New York*, written in 1839, is the earliest example of his style offered to us; and a speech delivered to the Law School of the University of New York, in April of this year, is the last. The text of both is, "codify, codify." Codification is Mr. Field's cure for all the ills the administration of justice is heir to, and he seems to have lost no opportunity of preaching this gospel to his fellow-men. At Manchester or New York, in Frankfort or Brussels, Norwich or Geneva, it is always the same,—"the advantages of an international code."

In spite, however, of the sameness of the text, these papers are of much greater interest than those which occupy the first portion of Vol. I. Speeches on small constitutional points with regard to an action of certain military courts at the time of the Civil War will not find many enthusiastic readers in this country, while the papers and speeches on the New York codes will naturally be of more interest to those on the other side of the Atlantic.

A considerable number of interesting papers are collected under the convenient heading "Miscellaneous." They contain anecdotes, descriptions of American scenery, after-dinner speeches, and addresses to various societies. Under the title of *Williams, the Beautiful*, a title worthy of A. K. H. B.'s brightest days, we have an address delivered by Mr. Field, in 1875, to his old College Debating Society at Williams' College. Possibly the extravagance of youth had infected the aged jurist when revisiting the scenes of his early triumphs and scrapes, for his imagination

seems to have run away with him in picturing not merely a completed code, but—

“The parliament of man, the federation of the world.”

His prophetic words are: “Europe cannot continue for fifty years to support armaments of present proportions. Their reduction must lead to international arrangements for the settling of disputes; and among the achievements of the coming age I look confidently for a general treaty of the nations, adopting a plan of arbitration to settle disputes, relieve the world of the burdens of great standing armies, and reduce to the utmost the chances of war. This, I venture to believe, will be accomplished before the class of 1925 takes its leave of these halls. I have said I look for a federation of all English-speaking peoples. When and how this will be brought about is more than I can venture to surmise. But of this I am confident, that such a federation would be the most potent instrument ever yet contrived for promoting the peace, liberty, and order of the world.”

Though sometimes Mr. Field's oratory sinks to bathos, his style is rarely disfigured with Americanisms, and there is a vigour and freshness in his writings, and often an impassioned fervour in his speeches, that relieve him of the charge of dulness, and make even his pleadings at the bar pleasant reading.

The Month.

On Legal Education in a University and the Proper Relations of the Faculty of Laws to the Professional Corporations.—We extract the following from a paper read by Professor Lorimer at a conference at the International Health Exhibition on August 5th:—

“... The study of jurisprudence in relation to its sources, whether it be prosecuted from the philosophical or the historical point of view, or, as I have always contended that it ought to be, from both, is so strictly an academical subject, that even to indicate its outlines would lead us into deeper waters than we can venture upon here. It will be obvious, however, that it is the study which bridges over the gulf that so many of our countrymen fail to pass between the abstract studies to which their youth is devoted and the practical pursuits in which they are called upon to engage the moment that they quit the university. Its object, so to speak, is to utilize philology, history, and philosophy, by placing before the legislator the ideal goal which he must strive to reach in the various relations which he will be called upon to define. In continental universities it is usually presented in two aspects—that of a preliminary outline or encyclopedia, as it is

called, of the whole subjects afterwards to be taught, and that of a profounder and more searching discussion of the relations in which these subjects stand to their sources and to each other, which is sometimes called the philosophy of law, and sometimes by its older name of natural law, but which will probably be most intelligible to us under the epithet of general jurisprudence. The name by which we call it is of no great importance, but the thing itself ought unquestionably to be taught in every legal faculty. If it can be taken up in the two aspects I have mentioned, as the initial and final stage of legal study, so much the better. If not, the two aspects may be presented in conjunction in a single course of lectures. The necessities of my position have compelled me to follow the latter practice, and I am not aware that much inconvenience has resulted from it. We must bear in mind, however, that it cannot be taught to persons of very immature mind, or who have previously acquired some knowledge of logic and ethics, and, in all cases where it is possible, a degree in arts ought to precede the study of jurisprudence. This common foundation of general and legal culture being laid, the course of study ought, in my opinion, to be adapted to the career upon which the student proposes to enter, very considerable latitude in the choice of subjects being allowed him. It will be found that the students in a faculty of law divide themselves, for the most part, roughly into two classes:—1st, There are those who propose to practise the law either as barristers or solicitors. For members of the bar a more elaborate course of academical instruction in law will fall to be provided, and higher preliminary acquirements may be imposed upon them than would be reasonable in the case of those who are to devote themselves to the agent branch of the profession, whose public instruction always has been and will probably continue to be, supplemented by apprenticeship. In the University of Edinburgh two degrees, intended to meet their respective requirements, have been instituted. The higher degree, that of LL.B., proceeding on a previous degree in arts in some recognised university, now admits to the Bar without further examination, and if a corresponding privilege were granted by the other branch of the profession to the lower degree of B.L., in conjunction with a somewhat shorter apprenticeship than is at present imposed, the university would have nothing further to ask of the corporations. For professional students of both classes the municipal laws of Rome and of their own country must always be the leading subjects; but when these are provided for, considerable freedom in the choice of other subjects, such as International Law, Constitutional Law, Political Economy, Medical Jurisprudence, etc., might be allowed. Too many ought certainly not to be imposed, and the character of the examinations ought not to be raised beyond the standard which cultivated youths of ordinary capacity and industry may be expected to reach. If this be

attended to, it is a question for the corporations whether, in their own interest, they ought to keep open those back doors of admission by corporate, as opposed to academical examinations, which at present exist in all branches of the profession. 2nd, The second class into which students in a faculty of law divide themselves, may be held to embrace all those who do not intend to practise the law, but who study it for purposes either of personal and citizen culture, or with a view to such non-judicial appointments as it has been the custom to reserve for members of the bar. Hitherto it has consisted chiefly of young men of fortune, who regarded it as a preparation either for political and official life, or for the management of their estates and of the local business of the counties with which they were connected. But it is a class which appears to admit of almost indefinite increase, and which might be increased with great benefit not only to the Universities and to the Bar—to which most of them would, no doubt, continue to be called—but to the whole community. It is from this class of persons that our legislators, as a general rule, ought to come, though the rule is one which ought unquestionably to be confirmed by many exceptions in favour of those whose special gifts or services have commended them to public confidence. In the case of this class of students, the option of courses of lectures ought probably to be extended even to the classes of municipal law, though it may be doubtful whether the study of one municipal system at least ought not to be imposed for every law degree. Probably the better course would be, that in conducting the classes, a distinction should be made between the general and technical teaching, and that in the classes of the Roman and Civil Law, and of the Municipal Law of the country to which they belonged, the general portion only should be imposed on non-professional students. This, in conjunction with a course of General Jurisprudence, would lay a sufficient foundation of legal training for non-professional purposes, and when it was completed their more special studies would be directed to Constitutional Law, International Law, Political Economy, Political Ethnology, and Geography, together with History, which ought to be presented to them mainly in its political, social, ecclesiastical, and economical aspects, as distinguished from a mere narration of past occurrences. Several of these classes would naturally belong to more than one faculty, and attendance on them would count for other than law degrees. Whether graduation in these subjects or in such of them as might be selected by the candidate or imposed by the profession, ought to admit to the Bar and to the other legal corporations, is a question which the corporations, in the first instance, might possibly be disposed to answer in the negative. Ultimately, however, it would come to be seen that the interests of the practising members of these bodies could scarcely be prejudiced by the admission of this class of graduates, whilst their whole members would be benefited by

the contributions which they would make to the funds, and still more by the stronger ties by which the legal corporations, through them, would be bound to the political and official life of the State.

"I must add a few words with reference to the teaching staff, by whom the duty of instructing what, in this country, would be to some extent a new class of law students, would fall to be discharged. Hitherto the professors of the Faculty of Law in the University of Edinburgh—with the exception of the Professor of Conveyancing, who, for special reasons, is always a Writer to the Signet—have been drawn exclusively from the Bar; and the same has been the case at the English Universities and in the Inns of Court. As a rule, I think this practice ought to be adhered to, because the academic staff merely represents the scientific side of the profession, and the more closely science and practice are bound together, the better for both. But were the scope of the legal faculty to be extended in the manner here suggested, the rule ought not to be adhered to with the same rigour as when its object was confined to the training of legal practitioners. Other things being equal, a diplomatist would probably make a better Professor of Public International Law than a lawyer, and there seems no reason why we should insist on our Professors of Political Economy or History being members of the Bar, even though these subjects were recognized as branches of legal instruction. The Professor of the Philosophy of Law, however, ought, in my opinion, wherever it is possible, to be a member of the profession, because otherwise that subject will drift away from practice altogether, and be regarded merely as a branch of the metaphysics of ethics. Had Kant and Hegel and Trendelenburg been bred to the law, their systems need not have been less profound, and would certainly have been more intelligible and practically important. It is, no doubt, difficult to find practical and theoretical gifts of a high order in combination, and still more difficult to induce their possessors to accept, or at any rate to retain, what must always be the modest, and, as regards externals, the unambitious position of a professor. Your philosopher will not generally be a man who either has had, or could have had, an extensive practice. But there is a great difference between an extensive practice and no practice, and I should be disposed to insist, not only on his belonging nominally to the profession, but on his having at some period of his career really put his shoulder to the professional wheel. And this leads me in the last place to make one or two general remarks as to the class of men whom we must strive to secure as occupants of the chairs of a faculty of law. As we do not choose our students, we must bear in mind that, whatever the character of our professors may be, they will always have clever students to deal with. It is the clever students, moreover, who gives its tone to a class; and as law students are no longer boys, they are apt

to be critical and exacting. Unless a professor succeeds in keeping their thoughts fully occupied, they will become impatient and troublesome in his hands. That a professor should have something to say on his subject which youths of this description are not likely to find elsewhere, thus becomes a *sine quâ non*. On the other hand, it must be remembered that rare gifts are rare even amongst professors. Originality, depth, subtlety, and eloquence do not fall to the share of every one on whom the academical mantle descends. It is not every one who can penetrate the recesses of nature, either moral or physical, and carry fresh treasures away. For professors of this class we must wait till God sends them. They are not to be bought with money, and the fame which we cannot withhold is the only worldly advantage for which they are likely to care. But good gifts, even of the kind we desiderate, are not rare. On the practising side of the profession—at the Bar and on the Bench—there are always many able and efficient men, keenly interested in learned and philosophical pursuits, who would gladly return to the universities if anything like reasonable inducements were offered them. Men who are worthy to be the servants of science will, in general, be willing to offer very considerable sacrifices on her altar. But when science demands them body and soul, and insists on coupling the fame which she promises only to her special favourites with what, comparatively at any rate, must be regarded as starvation, sensible men are apt to think science a little unreasonable. If we are to have in our chairs the best men whom each professional generation produces, we must strive to give them some equivalents for the emoluments and the honours which we call on them to forego. I urge this consideration, because I believe it to be of special importance for the efficient working of faculties of law. That is not a sphere of activity in which cheap labour can be counted on. By bringing the chairs into connection with the State departments to which they are related—the chair of International Law, for example, with the Foreign Office, and the chairs of Constitutional Law and Political Economy with the Home Office and the Board of Trade—and thus giving to their occupants the character of State officials in occasional employment, as is so often the case on the Continent, much might, no doubt, be done to add to their attractions. But we must make up our minds to accept the fact that, in the legal profession, the duties of a professor and of a successful practitioner are incompatible. In medicine it is different, and a medical chair in place of being an impediment is a passport to practice. But there never has been an instance of a lawyer who succeeded in both careers at the same time. Nor is it possible, in a faculty of law, to supplement an inadequately endowed and feeble professoriate by lectureships, fellowships, tutorships, and the like. Law students are not generally drawn from the class to whom the spur of poverty will prove

an incentive, and unless there are valuable and important academical offices to look forward to, young men of ability will not endanger their professional prospects by accepting the minor appointments."

Industrial Sick Insurance in Germany.—A new law, of great importance to the industrial population of Germany, which was passed on the 15th June 1883, comes into force on the 1st December 1884, and is of sufficient interest to warrant a short outline of its scope, which is, broadly speaking, the making insurance against illness a compulsory matter, not only on the part of the working class proper, but of a much more extended section of the industrial community than has hitherto been included. It must be remembered that the principle of obligatory insurance is not new in the German Empire, or at all events in several parts of it, for it has been acted on more or less both in Prussia and Bavaria. It was left to the communes to carry out, but so much latitude was allowed, that it became in practice a kind of local option, and was generally more honoured in the breach than in the observance. In the future, however, the case is to be different, and the communes will doubtless acquiesce all the more readily in the obligation, inasmuch as one of the powerful effects of the legislation will be to diminish the calls upon public assistance, or, in other words, to keep down pauperism. It will be, therefore, as much to the interest as it will to the duty of the communal authorities to see that the new law is properly carried out. The compulsory insurance of miners against accident and sickness has been an industrial feature in Prussia and Saxony for a long time past, and since 1854 has been regulated by an ordinance, that every one working underground should become a member of the miners' benefit fund (*Knappschaftsvereine*). An industrial law was passed in Prussia in 1849, by virtue of which the workmen of any particular locality could be compelled to become members of existing benefit societies, and in 1854 this was made a little more stringent, inasmuch as it became obligatory on the workmen to form mutual societies among themselves. In South Germany the communes had the right of levying a regular contribution from the workmen to the benefit fund; while in Bavaria all servants, apprentices, workmen, and day-labourers had the right, when away from their legal domicile, to seek relief for the period of ninety days, which relief the commune was bound to give. In return the commune could enforce a weekly contribution of fifteen pfennige (although previous to 1875 it was only nine pfennige), this relief being in no way connected with the ordinary poor law relief for paupers. By the law of 1876, the communes throughout the Empire were given the power of compelling all workmen under sixteen years of age to become members of the communal benefit society; but in consequence of

the small amount of ardour that was shown in the matter, and the general socialistic agitation that prevailed about this time, the Government determined to re-arrange the whole system, and to close a considerable number of the existing societies. At that time (1880) there were in Germany 4901 registered benefit funds, with 839,602 members participating in the same. To these must be added 200,000 members in non-registered societies, and 320,000 belonging to the *Knappschaftsvereine* or miners' benefit funds, making altogether about 1,360,000 persons availing themselves of sick insurance, of whom 1,200,900 were working-men.

The new law, which is so shortly to come into operation, distinguishes two categories of insurers—first, those who are obliged by the law of the land to insure; secondly, those who come within the scope of the communal authority. The first embraces all persons permanently engaged in manufactures, trades, and commerce, including *employés* of the lower grades, who, from the smallness of their salary, are little, if any, better off than the actual working man. In the second category are the small masters and those who work at home for the large firms, as also those who are employed on tramways and in hauling, agricultural labourers and foresters, and, in fine, all those who are working on daily wages. The law recognises six different kinds of benefit funds, viz.: 1, the local fund, which embraces one or more kinds of industry, and can, if preferred, be established by several communes acting together; 2, the factory fund; 3, the public works and building fund, which is of a more or less temporary nature; 4, the guild funds; 5, the mine fund; 6, the funds of previously registered and recognised societies; and to these may be added the communal fund, which is generally established as a *pis aller*, when there is none other to fall back upon. Communal insurance is, in fact, only applied to those cases which have no claim upon other funds, and employers are not obliged to contribute towards it, although they have to do so when there is a local, a factory, or a building fund. It may be, therefore, easily understood that the communal fund is less in favour than any other, as it is more costly in its administration, and assumes the form of a local tax, which is never very popular, whereas the local funds are necessarily largely supported by both employers and employed, the latter of whom have a preponderating voice at the general meetings. For this special reason, indeed, the local fund is more liked than the factory fund, where the employer has the largest voice in the management, though it is only fair that he should have, seeing that he has the trouble of keeping the accounts, and has the responsibility of making any temporary advances if the fund at the time is not at sufficiently high water. Moreover, when a workman enters a factory fund, he must give up the local fund to which he formerly belonged, and thus is obliged to change his benefit fund as often as he changes his

employer, which is not seldom. The amount of subscription to the local fund is fixed by law at 2 per cent. of the average daily wage, and must not exceed 3 per cent., in case the former is not sufficient to cover the expenses of the relief. Even this latter increase cannot be undertaken without the consent of both master and workmen. As a general rule, the local fund must be organized for persons occupied in the same branch of industry; but when this number is below 100, a local communal fund may unite other branches of trade in the same organization. In case of sickness the relief furnished by the local fund consists of gratuitous medical attendance, bandages, and all necessary medicines and appliances, while, after the third day, a money allowance is given equal to half the daily average wage, so long as it does not exceed 3s. for thirteen weeks. Similar help is given to women for three months during confinement; and in case of death a burial allowance is made, amounting to twenty times the average daily wage of the locality. In exceptional circumstances the benefit of the local fund may be extended, but in no case can it be employed for any purpose outside the fund—such as chronic invalids, widows, or orphans. When necessary, the sick person may be placed in a hospital instead of being treated at home, and in this case his family receives a money allowance for their maintenance. We may mention the city of Frankfort-on-Main, as an instance of a place in which obligatory insurance (not communal) is an organized system. It has 140,000 inhabitants, of whom 1126 are *employés*, 21,821 are work-people, and to these may be added some 13,931 domestics. At the present time there are thirty-eight benefit insurance funds with 4943 members; for those who would come under the second category, viz. *employés*, etc., there is only one fund with ninety members. There are no mines or miners in the neighbourhood, and no guilds except two, belonging to the chimney-sweeps, with twenty-three members, and barbers with 179. Of the existing funds eleven are factory and workshop funds, with 1621 members, and it is evident that the position of the whole of the thirty-eight funds is of a very limited nature, and not sufficient to conform to the exigencies of the new law, and there will therefore require to be a re-arrangement by the commune. Frankfort contains some 258 different trades, of which forty-six have over 100 workmen and *employés*, and the total number of the local funds will probably be placed in nineteen groups, of which five will have less than 500 members and the remaining fourteen an unlimited number beyond.—*Times*.

The Parliament House.—During the vacation considerable improvements have been carried out in the Parliament House. The Hall has undergone a great change for the better, the walls having been painted a dark lake colour as high as the string-course, and a pale yellow above. This enables the pictures to be seen to

much greater advantage than they have hitherto been, and the larger portraits are now raised completely above the string-course, thus avoiding the "cut" appearance which they formerly presented. The floor has been oiled, and in consequence has been made darker in tone and more in harmony with the surroundings. It is at present somewhat slippery, but we are glad to be able to state that the expectations of the Junior Bar that some less sure-footed senior would be temporarily laid up from a fall has not yet been realised. We regret to miss a few of the pictures from the walls, notably the splendid one of Lord President Hope. It seems that after they had been exhibited at the Loan Exhibition, their owners, the Society of Writers to the Signet to wit, determined not to allow them to be ranged with the general collection of legal portraits on the walls of the Parliament House, but to hang them on the staircase leading up to the large hall of the Signet Library. This, we think, is an unwise decision, as the pictures will not be seen by nearly so many people as they were formerly. However, the collection in the Parliament House is, we are happy to say, growing both in numbers and importance, several new pictures having been presented to the Faculty within the last year. It is a collection which every one interested in the legal history of the country should do his utmost to increase.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF LANARKSHIRE AT GLASGOW.

GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY v. ALEXANDER & CO.

Railway Goods Traffic—"reasonable charges."—The facts of the case are explained by the interlocutor:—

Glasgow, 11th August 1884. — Having heard parties' procurators and advised the cause, Finds—(1) That the defenders, Alexander & Co., supply boxes of a particular description with little inside cases for Nobel's Explosive Company's Works at Ardeer: Finds—(2) That Nobel's Works at Ardeer are connected with the Stevenston Station of the pursuers, the Glasgow and South-Western Railway Company, by a private railway worked by pursuers (which serves mainly Merry & Cunningham's Works at Ardeer), about ten-sixteenths of a mile in length, and then by a similar line of about the same length belonging to and worked by Messrs. Baird, for which latter service the Bairds charge 1s. per ton: Finds—(3) That the boxes in question are carted from defenders' works in Govan to the Govan Station, loaded there carefully—generally in covered vans, as they require great care—and are transmitted to Stevenston by train, are then shunted and left for a train coming up

from Ardrossan which takes them to Ardeer, whence they are taken to Nobel's and unloaded (not by pursuers), but a special man from Stevenston accompanies each train to check the goods, especially defenders' boxes, which has to be done at the unloading: Finds — (4) That originally in 1873, pursuers charged 13s. 6d. per ton for the above services, and thereafter, on remonstrance, 10s. 10d. per ton, which has continued ever since, but no separate charge was made for carting till July last, 1888, to which when made the defenders objected, and disputes continued, and the pursuers have now raised the present action for the July, August, and September accounts to the extent of £25, 17s. 5d., the defence being that for other than cartage the pursuers are only entitled to make the mileage charge of 9s. 4d. per ton: Finds on the whole case and in law, that the pursuers have proved that the charge of 10s. 10d. made by them, including mileage at 9s. 4d., is a fair and reasonable charge in term of their Acts: Therefore decerns against defenders in favour of pursuers for the said sum of £25, 7s. 5d., with interest thereon as craved, but under deduction always of the sum of £24, 7s. 5d. as set forth in the defences: But in the circumstances, finds no expenses due to or by either party, and decerns.

(Signed) A. ERSKINE MURRAY.

Note.—The pursuers' Consolidation Act, 1855, sec. 10, is as follows: "It shall not be lawful for the Company to charge in respect of the several articles, matters, and things, and of the several descriptions on animals hereinafter mentioned, conveyed by them on the said railways, any greater sum, including the charges for the use of the carriages, waggon, or trucks, and for locomotive power, and all other charges incidental to such conveyance, except a reasonable charge for the expense of loading and unloading, where such service is performed by the said Company, and for the use of any wharf, basin, loading place, and station, except as aforesaid, than the several sums hereinafter mentioned, etc." This is shown by previous sections to mean that the Company are entitled to charge, in addition to the rate per mile there specified, a reasonable charge for loading and unloading where done by the Company, and for the use of any wharf, basin, loading place, and station, except for wharves and basins in connection with the railway from Paisley to Renfrew.

The pursuers are charging 10s. 10d. per ton. Of this 9s. 4d. per ton is the mileage rate from Govan to Stevenston. So the question is whether they are justified under the above clause in charging 1s. 6d. more.

They give three grounds of charge: (1) Loading and station expenses at Govan; (2) Station expenses at Stevenston; (3) Charge for the working of the private railway as far as Ardeer.

As regards the station expenses at Govan, there are two ways of looking at the matter, either taking the whole tonnage and the whole expenses, and dividing the expenses by the tonnage, to find thus the actual cost per ton, not allowing for profit. Taking the state No. 19, this makes the cost to the Glasgow and South-Western Railway for total station expenses, wages, etc., at Govan, 1s. 2½d. per ton. It is argued, however, that as the tonnage of the Caledonian Railway at Govan is greater than that of the Glasgow and South-Western Railway,

although the Glasgow and South-Western Railway must share the cost, it is unfair to the customers of the Glasgow and South-Western Railway to charge them at the full rate, as they are not responsible for the fact that the Glasgow and South-Western Railway may not have made so good a bargain as the Caledonian Railway Company. The Sheriff-Substitute cannot quite agree with this argument, as the question is, What is a fair sum for the Glasgow and South-Western Railway to charge? and as the Glasgow and South-Western Railway get the use of the station on certain conditions, if they only make their customers pay in proportion to what they themselves pay, they are not charging unfairly. The other mode of judging is by looking at the individual expenses. Here it is clear from the evidence that there is extra trouble and expense in loading. The work has to be done very carefully, and stopped during any shower, as the boxes must not get wet or soiled. Two men are employed besides the lorryman, whose work is otherwise charged for under the head of cartage.

On the whole, the Sheriff-Substitute is inclined to hold 1s. a ton would be a fair charge as regards Govan.

As regards Stevenston and the private railway, the Sheriff-Substitute thinks these must be dealt with together. Either Stevenston is the station, or it is not. If pursuers can charge station expenses for Stevenston, the Sheriff-Substitute does not think they can charge for the private railway as a separate course. As a matter of distance, the private railway would add nothing to the mileage, as the distance would still fall within the 28 miles. Practically, in the opinion of the Sheriff-Substitute, the private railway between Stevenston and Ardeer, worked by pursuers, is just on the footing of a long siding at Stevenston Station belonging to and worked by pursuers. What services are then the pursuers entitled to charge in connection with Stevenston Station and this siding? There is no unloading. They are not entitled to charge a colliery owner for shunting into his own sidings; see Lancashire and Yorkshire Railway—*Gidlow*. (Law Reports, House of Lords, English and Irish Appeals, vol. vii. page 517.) But they are entitled to charge for expenses connected with signalling and pointsmen where goods are shunted off their main line into a siding; and the expense of the extra man who is sent up the private line with all goods to Nobel's works to check them, and has to check defenders' goods more carefully than any other, seems a fair Stevenston Station charge. The means of forming an estimate as to what these may amount to per ton, are very small. The pursuers refer to the Clearing House Regulations, which, as between railway and railway, fix terminal expenses with cartage at 4s. a ton, and without cartage (as here), at 1s. 6d. a ton. It is true this is merely a matter of agreement between railways (taking a rough estimate on the whole); still it is some guide as an average, as railways would not be likely to allow each other more than a fair rate for terminal charges.

On the whole, the Sheriff-Substitute is of opinion that these charges may fairly amount to 6d. per ton. Adding this, therefore, to the 1s. per ton at Govan, and the 9s. 4d. mileage, the pursuers' 10s. 10d. per ton appears on the whole to be a fair and reasonable charge.

As to the expenses, it appears that when the traffic was commenced in 1873, the defenders were at first charged 13s. 6d. per ton. On remon-

strance, this was reduced to 10s. 10d., at which figure it has remained ever since. But all along till July 1883, the pursuers allowed the 10s. 10d. to cover cartage. Since July 1883, they have begun to make a separate charge for cartage, and say that it was omitted previously by mistake. This may be; but after ten years of the charge including cartage, the defenders might well be justified in believing that the 10s. 10d. including cartage must be a fair rate, and that the attempt to exact cartage was an extortion. It is the pursuers allowing the matter to sleep for so long, which is the defenders' main reason for resisting; and in the circumstances, the Sheriff-Substitute considers that the defenders had reasonable grounds for asking the pursuers to prove the reasonableness of their charge, and should not be found liable in expenses. (Intd.) A. E. M.

Note.—Defenders appealed to the Sheriff-Principal, but afterwards withdrew their appeal.

Act. Anderson—*Alt.* Buchan.

SHERIFF COURT OF FORFARSHIRE AT DUNDEE.

Sheriff-Substitute CHEYNE.

KYDD *v.* LIDDELL.

Warranty.—On 25th March last Mr. James Kydd, cowfeeder, Broughty Ferry, purchased at Messrs. Dodds & Bathie's auction mart, Dundee, a cow which was warranted by the seller, Mr. William Liddell, Denny, to be "all correct and sound." The cow was taken delivery of by Mr. Kydd, but died in his possession fifteen days after the day of sale from the results of a cold. A *post-mortem* examination showed that the animal had been suffering from internal complaints previous to the sale, and Mr. Kydd brought an action against Mr. Liddell for repayment of the price, which he had settled, less the nett proceeds of the carcase of the animal, on the ground that it was unsound at the date of sale. A proof was lately led in the case, and the parties' agents heard. Sheriff Cheyne has now issued the following interlocutor sustaining the pursuer's contentions :—

"*Dundee, 8th September 1884.*—The Sheriff-Substitute having advised the process, finds that at a public sale held in the Cattle Market, Dundee, on 25th March last, the pursuer purchased a milch cow belonging to the defender, at the price (which was duly paid by bill) of £20, 5s., and on a warranty that she was all correct and sound: Finds that the said cow was taken direct by the pursuer straight from the market to his byre in Broughty Ferry, and that she died there on 9th April: Finds that during the fifteen days that she was in pursuer's possession the cow was dull and off her food, and did not give much milk; but the pursuer, not unreasonably, attributed these symptoms to the fact that she had recently calved, and till within a few hours of the death did not apprehend any danger or see any cause to call in professional assistance: Finds that in the opinion of Mr. Spreull, a veterinary surgeon of experience, who made a *post-mortem* examination of the carcase on behalf of the defender, and

who is the only witness upon the point, the death 'arose from the effects of exposure to cold in transit, by rail or otherwise, setting up irritation of the bronchial tubes, congestion of the lungs, and emphysema of the interlobular tissue;' but the *post-mortem* examination also revealed the fact that the animal was suffering from an aneurism on the posterior *cava cava* just as it passes through the liver, which aneurism, Mr. Spreull says, must have existed for several months, at all events might at any moment have proved fatal, and though probably not the direct inducing cause of the acute disease of which the animal died, would have the effect of debilitating the system, and so predisposing the animal to take cold and preventing its throwing a cold off: Finds, as a consequence of the preceding finding, that the cow was unsound at the time she was bought by the pursuer, and, that there being thus a breach of warranty, the pursuer is entitled to repetition of the price and cost (3d.) of bill stamp, under deduction of the nett proceeds received by him for the carcass, which amount to £5, 13s. 6d.; and having regard to these findings, decerns against the defender for the sum sued for with interest, as craved: Finds the pursuer entitled to expenses, allows an account of these to be given in, and remits the same, when lodged, to the auditor of Court to tax and report.

(Signed) JOHN CHEYNE.

"*Note.*—That the defender gave the warranty in entire good faith, and in the full belief that the cow was sound, I do not for one moment doubt; but it is conclusively shown by Mr. Spreull's evidence that, in point of fact, the cow was at the date of the sale labouring under a chronic disease which constituted it unsound, and, though in Mr. Spreull's opinion that chronic disease was not the direct cause of that acute malady which actually caused death, it undoubtedly rendered the animal less able to resist the acute malady; and that being so, it humbly appears to me that the defender must answer as for breach of warranty. The case of *Brown v. Boreland*, 29th June 1848, 10 D. 1460, referred to at the discussion, is very much in point. Of course, if it had been shown that the pursuer treated the cow in such a way as would have occasioned its death had it been healthy, there might have been room for refusing him repetition of the price; but nothing of the kind has been shown. It is certainly possible that if a veterinary surgeon had been at once called in by the pursuer, and active treatment administered, the cow's life might have been prolonged; but, having got a warranty of soundness with her, and having done nothing to her beyond driving her from Dundee to Broughty Ferry, the pursuer cannot, I think, be blamed for attributing, as he says he did, her dulness and the other symptoms which she exhibited to the fact that she had recently calved. As regards expenses, I have had some doubts whether I ought not to have allowed the pursuer only those expenses which he would have incurred had he brought the action in the Debts Recovery Court, in which Court, I am inclined, having regard to recent decisions, to think it might competently have been brought; but the point is certainly not free from doubt, and that being so I have come to the conclusion that I ought to make the ordinary finding.

(Intd.) J. C."

[The defender acquiesced in the above decision.]

Act. Duncan—All. Young.

SHERIFF COURT OF FIFE.

Sheriff-Substitute HENDERSON.

BROWNING v. BENNET.

*Removal Terms (Burghs) Scotland Act, 1881.—Notice of removal.—Held that notice must be given 40 clear days before May 15 or November 11.—*James Browning, LL.D., Abbey Park, St. Andrews, presented a petition in the Sheriff Court of Fife and Kinross at Cupar against David Bennet, carter, St. Andrews, praying the Court to grant warrant to summarily remove the defender from the dwelling-house and other premises situated at Abbey Park Gardens, in the burgh of St. Andrews, occupied by the defender as tenant under the pursuer for the year from Whitsunday 1883 to Whitsunday 1884. There was no written lease between the parties. The pursuer averred that the defender was timeously warned to remove at the term of Whitsunday 1884, by a letter addressed by the pursuer to the defender and delivered to his wife on 12th February 1884, and also by registered letter put into the post office addressed to the defender, dated 11th April 1884. The defender denied receiving the letter of 12th February, and as to the registered letter of 11th April, he averred that the last date upon which, by law, notice of removal in terms of the 5th section of the Act 44 and 45 Vict. c. 39 required to be given, was 4th April. He pled that, not having been warned to remove, he was entitled to possess the subjects till Whitsunday 1885 by tacit relocation, and to absolvitor with expenses. After proof and debate, the Sheriff-Substitute (A. E. Henderson) issued the following interlocutor :—

“*Cupar, 18th July 1884.*—The Sheriff-Substitute having heard parties' procurators and considered the notes of evidence, closed record and whole process, dismisses the petition, and assoilzies the defender from the conclusion thereof; and decerns: Finds the pursuer liable to the defender in the expenses incurred by him in this process; allows an account thereof to be lodged, and remits the same when lodged to the Auditor of Court in usual form, for taxation.

(Signed) “A. EDWARD HENDERSON.

“*Note.*—It seems clearly proved that the first letter of 12th February was written by the pursuer, and sent by him to be delivered to the defender. But the difficulty of the case is that it is not proved that the defender ever got the letter or became aware of its contents. He swears that he did not, and although there may be a presumption in favour of the letter having been received by him, still the pursuer has failed to bring home knowledge of the existence of the letter or its contents to the defender, or any of his family. That being so, it is necessary to inquire whether the pursuer can be held to have duly warned his tenant out of the house. After a careful consideration of the history of the customary 40 days' warning, and the decisions upon the subject, it is thought that he has not. The true principles to be deduced from the history of the 40 days' warning, both statutory and customary, and the decided cases, seem to be (1) that, provided all statutory and customary solemnities, such as service of a notice by a sheriff-officer 40 clear days before the Whitsunday or Martinmas terms, or warning by chalking the door by a burgh officer, or, as provided by the most recent statute (44 and 45

Vict. cap. 39, sec. 5), posting notice of removal by registered letter, so as to be received 40 clear days before the term, be complied with, whether the notice so given have come to the tenant's knowledge or not, still the observance of these solemnities or any of them will entitle the landlord to sue out an action of removing; (2) that any verbal or written intimation, however informal, will be sufficient to found such an action, provided it be beyond the 40 days, and be proved or admitted to have been heard or received by the tenant; (3) Where, however, there has been any departure from the formal statutory and customary procedure, and the tenant alleges that the notice never came to his knowledge, then the *onus* appears to lie on the landlord to prove that his tenant was duly informed of the intention to terminate the tenancy. That has not been proved here, and so the alleged notice of 12th February must be held to be disproved.

"The authorities, a perusal of which has led to the above conclusions, are: Stair, ii. 9, 39-40; Ersk. ii. 6, 47-8; Stat. 1555, cap. 39; A. S. Dec. 4, 1756; 16 and 17 Vict. c. 80, sec. 30; *Hunter on Landlord and Tenant*, vol. ii. pp. 56 and 83; Dove Wilson's *Sheriff Court Practice*, 3rd edn., p. 487; *Macbrair*, M. 13,861; *Tait*, M. 13,864; *Jolly*, M. 13,865; *Morris v. Allan*, March 8, 1839, 1 D. 667 (from the Session papers in this case it appears that the Court held the tenant was informed in due time of the intention to remove); *Robb v. Menzies and Another*, January 20, 1859, 21 D. 77 (Lord Deas' opinion there).

"The pursuer, however, had another contention on which he pleaded that he ought to prevail. A second letter was written by the pursuer to the defender on 11th April, and this letter was duly registered on 12th April, as provided by the Removal Terms (Burghs) Act 1881, and was admittedly received by the defender. This letter, however, if the 40 days' warning are to be reckoned from the Whitsunday term day, was not in time. The pursuer maintains that it was in time, because, by the third section of the Removal Terms (Burghs) Act, the 28th day of May is made the term for removal, and he contends that the 40 days should be calculated from that date, and not from the 15th of the month. It is thought that this contention cannot be sustained. From the commencement of the practice of giving 40 days' notice, the term day has been uniformly taken as the day from which the calculation was to be made. The earliest statute, that of 1555, out of which the practice of giving 40 days' warning has arisen, distinctly names 'Whitsunday,' and by the stat. 1693, cap. 24, Whitsunday is fixed as the 15th of May. No doubt in many places the tenant was not bound actually to remove until 25th May, but still the 40 days were always reckoned from the 15th. The 3rd section of the recent Act in altering the term of removing to the 28th, only fixed a day which should be uniformly observed in all burghs, and superseded local practice in different places. The 5th section says that a registered letter must be posted so as to be delivered, 'on or prior to the last day upon which by law' notice must be given. It is thought that 41 days before 15th May is that day.

(Intd.) "A. Ed. H.

The pursuer did not minute an appeal to the Sheriff, but has acquiesced in this judgment.

Att. J. R. Welch—Att. T. and R. J. Davidson.

SHERIFF COURT OF PAISLEY.

Sheriffs COWAN and MONCREIFF.

THE GLASGOW TRAMWAY AND OMNIBUS COMPANY, LIMITED, *v.* THE UNITED CO-OPERATIVE BAKING SOCIETY, LIMITED.

Reparation—Precautions for safety of public horse left in public street unattended, and frightened by passing train, bolted.—This is an action at the instance of the Glasgow Tramway and Omnibus Company, Limited, against the United Co-operative Baking Society, Limited, 90 St. James Street, Paisley Road, Glasgow, for the sum of £35 sterling damages, for a horse belonging to the pursuers having been killed through the fault of the defenders on 4th April 1884. The defenders' premises are situated in St. James Street, Glasgow, along the side of which runs the Clydesdale Junction Railway. On 4th April 1884, the defender's servant left a horse and bread-van standing opposite the defenders' premises unattended. The defenders' horse was frightened by a passing train, and ran off and came in contact with and killed one of pursuers' horses attached to a tramway-car which was passing along the Paisley Road. The pursuers pleaded—(1) that having suffered loss, injury, and damage through the fault or negligence of the defenders, their servants, or others for whom they were responsible, the pursuers were entitled to decree against the defenders for the sum sued for; and (2) that the sum claimed was fair and reasonable in the circumstances. The defenders pleaded—(1) there having been no fault on the part of the defenders or their servants, the defenders are entitled to absolvitor with expenses; (2) the accident to, and subsequent death of, pursuers' horse having been unavoidable, the defenders are not responsible, and are entitled to absolvitor with expenses; (3) even assuming defenders are responsible for the death of pursuers' horse, the defenders having offered to pay to the pursuers the fair market value of their horse and expenses of summons, are entitled to their expenses; (4) the averments of pursuers as to fault or negligence are irrelevant and not sufficiently specific to go to proof; and (5) generally on the whole circumstances the defenders are entitled to absolvitor. After a long proof, Sheriff Cowan issued the following interlocutor and note, finding defenders liable to pursuers in the sum sued for, with expenses:—

“ Paisley, 12th June 1884.—Having heard parties' procurators, and considered the closed record, proof adduced, and whole process: Finds in fact that on 4th April last, a brown mare, No. 5402, belonging to pursuers, was killed through being run into by a horse and van, the property of defenders; that at the time of the occurrence said horse and van was in charge of John Landels, a driver in the employment of the defenders: Finds, under reference to the accompanying note, that the said occurrence was caused by the gross carelessness of the defenders, or their said servant, for whom they are responsible, he having, in accordance with what is the usual practice at the defenders' establishment, proceeded to unyoke the said horse in the public street, and for that purpose having laid aside the reins and abandoned the control of the horse, so that being startled it bolted, and the driver was unable effectually

to regain the reins and stop it: Finds in law that the pursuers are entitled to damages. Therefore assesses the same at the sum of £35 sterling, and decerns therefor in terms of the prayer of the petition: Finds the pursuers entitled to expenses; allows an account thereof to be given in, and remits the same when lodged to the Auditor of Court to tax and report.

(Signed) HUGH COWAN.

Note.—The arrangements at the defenders' bakery stables appear to the Sheriff-Substitute objectionable. Their premises front a street of no great breadth, *ex adverso* of which, and fenced off from it by a wooden paling, there is a busy line of railway with trains constantly passing up and down, and yet the defenders provide no other place for the yoking and unyoking of their bread vans, numbering fourteen, than the public street. Unless they provide patent horses, warranted to stand perfectly still, it cannot be said to be matter of surprise if now and again a passing engine should start off a horse to the manifest danger of the public; should such happen at any time, the question naturally arises, Is no one responsible for it? This is plainly not one of those risks of street traffic to which foot passengers and vehicles ought to be exposed. In the opinion of the Sheriff-Substitute, it is a danger caused and produced by the faulty arrangements of the defenders. In the present case the danger was intensified by the carelessness of the defenders' servant. He was in charge for the second time only of a horse recently purchased, no doubt sold as a quiet horse, but a strong powerful animal, coming from quiet farm work into the noise and bustle of the town. The stableman was within call, and yet proceeding to unyoke that horse in the dangerous surroundings of the place, he did not ask his assistance. The import of the evidence is that he also fastened up the reins on the top rail of his van, which would make it more difficult to recover the control of the horse when he did start. On this point the evidence of Miss Ballantyne, corroborated by the real evidence, that Landels, at the time he caught the reins, was alongside the horse, and not alongside the van, and supported by the driver and conductors of the tram-car, is conclusive. As regards the value of the mare, the Sheriff-Substitute considers the evidence adduced by the pursuers to be much more reliable than that adduced by the defenders.

(Intd.) H. C."

The defenders appealed the case to Sheriff Moncreiff, who, after hearing parties' agents, issued the following interlocutor, adhering with additional expenses:—

Edinburgh, 15th October 1884.—The Sheriff having considered the debate on the defenders' appeal, together with the record, proof, and whole process, dismisses the appeal and affirms the interlocutor appealed against, with this qualification and alteration, that the sum of £35 sterling therein decerned for in name of damages, is subject to a deduction of £1, 7s. 6d. sterling, being the price obtained by the pursuers for the carcase of the horse in question: Finds the pursuer entitled to additional expenses, as the same shall be taxed by the Auditor of Court, and decerns.

(Signed) "HENRY J. MONCREIFF.

"*Note*.—The place where the defenders chose to yoke and unyoke their horses is one of exceptional danger owing to the vicinity of the railway. Exceptional care should therefore have been taken to prevent their horse from bolting. It appears to the Sheriff that in the present case the defenders' servant acted recklessly and without taking due precautions, and that the accident which followed resulted directly from his negligence. The pursuers are therefore entitled to damages. As £1, 7s. 6d. was allowed for the carcase, that sum falls to be deducted from the sum of £35 decerned for by the Sheriff-Substitute.

(Intd.) "H. J. M."

Act. Wallace & Wilson, writers, Glasgow—*Alt*. William Howie, for Keydens, Strang, & Girvan, writers, Glasgow.

Notes of English, American, and Colonial Cases.

BUILDING SOCIETY.—*Rules—Arbitration—Building Societies Act, 1874* (37 and 38 Vict. c. 42), s. 34—*Sale by Building Society of leaseholds mortgaged to it—Action to set aside*.—A building society registered under the Act of 1874, by whose rules it was provided that disputes between the society and any of its members should be settled by arbitration, sold to one of its members leaseholds mortgaged to it by others of its members. The mortgagors brought an action to set aside the sale on various grounds of fraud:—*Held*, that the questions raised in the action were not compulsorily referable to arbitration, as being a dispute between the society and some of its members. *French v. The Municipal Permanent Building Society*, 53 L. J. Rep. Ch. 743.

Hack v. The London Provident Building Society (52 L. J. Rep. Ch. 225, 541; L. Rep. 23 Ch. D. 103) and *The Municipal Permanent Building Society v. Kent* (53 L. J. Rep. Q. B. 290; L. Rep. 9 App. Cas. 260) distinguished.—*Ibid*.

BUILDING SOCIETY.—*Rules—Certificate of barrister—Unlimited borrowing—Equitable mortgages—Unsecured creditors—Preference shareholders—Investing or unadvanced members—Priorities—6 and 7 Will. IV. c. 32—Building Societies Act, 1874* (37 and 38 Vict. c. 42), ss. 7, 8, and 15—*Building Societies Act, 1875* (38 and 39 Vict. c. 9), s. 1.—A rule of a benefit building society, enrolled under 6 and 7 Will. IV. c. 32, authorising the society to borrow money is not invalid merely because it omits to prescribe a limit to the borrowing power. *Murray v. Scott. Brimelow v. Murray. Agnew v. Murray* (H. L.), 53 L. J. Rep. Ch. 745.

Dicta of Lord Hatherley in *Laing v. Reed* (39 L. J. Rep. Ch. 1; L. R. 5 Ch. 4), Malins, V.C., in *Hill's Case* (39 L. J. Rep. Ch. 629; L. Rep. 9 Eq. 605), and James, L.J., in *In re The Professional, etc., Building Society* (L. Rep. 6 Ch. 856) examined.—*Ibid*.

A rule of a benefit building society enrolled under 6 and 7 Will. IV. c. 32 authorised the borrowing of money, and made the money to be borrowed a first charge on the funds and property of the society. The directors borrowed large sums under this rule, for some part of which they gave

as security equitable mortgages of specific assets of the society:—*Held*, that the equitable mortgages were invalid, and that all lenders under the rule were entitled to rank *pari passu* against the entire assets.—*Ibid*.

Another rule authorised the issue of deposit or paid-up shares of £30 bearing interest at five per cent., and allowed the depositor on giving a month's notice to withdraw the whole or part of his deposit in preference to all other shares. This rule was struck out by the certifying barrister, but nevertheless the society retained it in their printed book of rules, and under it issued many paid-up £30 shares. Afterwards the society amended the rule by substituting £1 for £30, and the barrister certified the rule as altered. The holders of £30 shares exchanged them for £1 shares, and other £1 shares were issued:—*Held*, that the issue of deposit or paid-up shares, as provided by the rule, entitled those holders who had given notice of withdrawal before the winding-up of the society to be paid after the creditors but in priority to other members.—*Ibid*.

BUILDING SOCIETY.—*Rules—Treasurer—Action for accounts—Audited accounts—Impeaching accounts on ground of fraud.*—One of the rules of a building society provided for an annual audit of accounts, and that after the auditing and signing of the accounts, the treasurer should not be answerable for mistakes, omissions, or errors afterwards proved in the accounts. In an action by members against the treasurer for accounts, —*Held*, that though the audited accounts must be received as *prima facie* evidence, the rule afforded no protection against the right of the members to impeach the accounts on the ground of fraud. *Holgate v. Shutt* (App.), 53 L. J. Rep. Ch. 774.

SHIP AND SHIPPING.—*Charter-party—Construction of—Demurrage—Frosts preventing loading.*—By a charter-party it was agreed that a ship should proceed to Cardiff East Bute Dock and there load from the agents of the freighters a cargo of iron; the cargo was to be supplied as fast as steamer could receive at all hatchways; "time to commence from the vessel being ready to load . . . and ten days on demurrage over and above the said lay days at £40 per day (except in case of hands striking work, or frosts, or floods, or any other unavoidable accidents preventing the loading, . . . in which case the owners to have the option of employing the steamer in some short voyage trade until receipt of written notice from charterers that they are ready to resume employment without delay to the ship)." The ship arrived in dock and commenced loading; but subsequently canals through which part of the cargo had to pass became blocked with ice, and in consequence a stoppage occurred of five days in the loading. The frost would not have prevented the loading had the cargo been ready at the dock, but the cargo could not have been brought to the dock otherwise than by the canals without unreasonable expense:—*Held*, that there was no frost "preventing the loading" within the exception, and that the charterers were liable for demurrage. *Grant & Co. v. Coverdale, Todd, & Co.* (H. L.), 53 L. J. Rep. Q. B. D. 462.

THE JOURNAL OF JURISPRUDENCE.

OF THE IDEA OF THE FAMILY IN MODERN SOCIETY.¹

THE subject with which I desire to occupy your thoughts during the first hour of this session is "The Idea of the Family in Modern Society." It is a subject so interesting and so vast, it branches out in so many directions, and admits of being treated from so many points of view, that I cannot afford the time that would be necessary were I to attempt to put aside in detail the points of view from which I am not to treat it.

Generally, however, I may state that it is not my intention, on this occasion at all events, to inquire into the origin of the family, or to criticise the various theories with reference to its development which at present engage so much of the attention of the learned. Some of these theories are founded on hypotheses which, if true, would degrade humanity not only below the ordinary condition of savages, but below that of the other higher animals. In proof of this allegation I need go no further than to Mr. Herbert Spencer's celebrated four stages of the development of the sexual relations. They are so frequently repeated and so industriously commented on by his disciples that most of you are no doubt familiar with them, and those who are not will find them enumerated in his *Sociology*, vol. i. p. 704.

I am far from denying that, under the influence of abnormal impulses and adverse conditions of existence, the earlier as well as the later of these stages may have manifested themselves, or may even manifest themselves now. The mistake, as it humbly appears to me, into which Mr. Spencer and his many followers are accustomed to fall, consists in regarding these abnormal conditions of existence in the light of institutions which ever had, or could have had, a recognised existence amongst men. The assumptions on which they rely when stretched to the extent of warranting such an inference, I believe to be hallucinations begotten of dwell-

¹ Professor Lorimer's Introductory Lecture, Session 1884-85.

ing too exclusively on the dark side of nature under the partial illumination of the midnight oil. Had their ingenious authors mingled more freely amongst their fellow-creatures in the light of day, they would have become acquainted with numberless counteracting influences, of which apparently they have taken no account. They would have come to see that, apart from moral instincts altogether, love and jealousy were sufficient safeguards against the growth of such customs amongst men and women, whilst they needed only to have consulted the first henwife they met in order to be assured that their realization in the poultry-yard was impossible. The feelings expressed in the proud and tender love song of the chivalrous Marquis of Montrose are more in touch with all healthy animal nature:—

“My dear and only love, I pray
That little world of thee,
Be governed by no other sway
Than purest monarchy ;
For if confusion have a part,
Which virtuous souls abhor,
And hold a synod in thy heart,
I'll never love thee more.

“Like Alexander I will reign,
And I will reign alone ;
My soul shall ever more disdain
A rival on my throne.
He either fears his fate too much,
Or his deserts are small,
Who dares not put it to the touch,
To win or lose it all.

“Then in the empire of thy heart,
Where I would solely be,
If others should pretend a part
And dare to vie with me,
By them my peace shall ne'er be wrecked,
I'll spurn them from my door ;
I'll sing and laugh at thy neglect,
And never love thee more.

“But if thou wilt be constant, then,
And faithful to thy word,
I'll make thee famous by my pen,
And glorious by my sword :
I'll serve thee in such noble ways
As ne'er was heard before ;
I'll crown and deck thee all with bays,
And love thee evermore.”

Leaving the dyspeptic speculations of the Sociologists behind us, then, let us turn to the family, which springs, as far as may be, from the “pure espousals of Christian man and maid.” Has the idea of the family, in this sense, undergone any serious modification during, say, the last fifty years? is it likely to undergo any in consequence of the political and social tendencies which are at present in operation amongst us? and in what manner may we best realize it, as it now presents itself to our minds?

It has been remarked, with great truth I believe, that in many directions the law of Status is giving place to the law of Contract, and it is argued that this process tends to the gradual disintegration of the family. Individual rights are being more and more asserted and recognised, and the personality of the female is being vindicated.

In so far as this process consists in the recognition of rights which have always existed, or of rights which have come into existence in consequence of the progress of female education and the wider range of duties which women are in consequence both able and willing to undertake, I believe, on the contrary, that it affords the surest means of strengthening both domestic and political organization. There is nothing that tears either the family or the state asunder so much as unrecognised rights and suppressed aspirations. They are like dynamite under the social or domestic structure. They may explode at any time, and sooner or later, they are sure to explode. But rights rest upon and are proportioned to powers, and if we attempt to carry them further than the powers in which they are centred we simply produce confusion. The error will be rectified by the irregular action of the objective power on which we have encroached; but the political, social or domestic anarchy engendered by the encroachment will be removed only by the legislative recognition of the real relation which we had failed to define. I do not think our legislation, as yet, has gone at all too far in the direction of what is very inappropriately called "female emancipation." The person of the wife, it is true, is no longer sunk in that of her husband; she can hold separate property over which he has no control, she can vote against him, if she choose, at school-board and municipal elections, and possibly may soon be able to do so at parliamentary elections also. But her power to hold separate property in the vast majority of cases will be merely a saving of trouble to her marriage contract trustees. Her husband, as her nearest, her most trusted, and in general, it is to be hoped, her most trustworthy adviser, will have more control over it, in place of less. In the case of a worthless or improvident husband, the possession of this power on the part of the wife, so far from disintegrating the family, may often save it from disintegration. It is only against very weak or very wicked husbands that the new arrangements are likely to act at all, and in their case, if they do not act to their satisfaction, they will very generally act for their good. Those of you, gentlemen, who get the kind of wives I wish you all, will be only too glad to hand over to them as much of the management of your family affairs as they are willing to accept, and will look even on the family purse-strings as safer in their hands than in your own. When the late Archbishop of Canterbury, after his wife's death, unable to restrain his grief, partially raised the veil which covers the domestic life even of persons in his position, we were told that

the officials of the Bank of England often complimented Mrs. Tait on the ability with which she conducted the Archbishop's extensive and complicated transactions. There is many a private gentlewoman in the land who, I am sure, is in the habit of receiving similar compliments from her husband's bankers. As for our wives and daughters voting against us at elections, that is an apprehension which disturbs my rest very little. I daresay it is quite true that they will often persuade us to vote with them, and it is possible that the hope of their doing so may sometimes lead to their being courted by candidates to a troublesome extent. But the inconvenience will not be formidable. The strongest head, whether it be on male or female shoulders, as a general rule will govern the vote, and as a general rule that will be right.

From the growth of individualism, then, and the wider recognition of the rights of the person, I think the family idea has neither yet undergone, nor is likely to undergo, any serious change.

But what of Communism and Communalism?—for we ought to be far more careful in distinguishing between these two conceptions than we usually are.

Of Communism it is sufficient to say that, like Socialism, it is a scheme which is at variance with natural laws, and the realization of which is consequently impossible. It proceeds on one or other of two assumptions,—either on the assumption that all men are equal and consequently have equal rights, or on the assumption that all men ought to be made equal, and that with a view to this result their rights ought to be recognised by positive law not only equally but as equal. The first assumption is contrary to fact: the second assumption, together with the aspiration which it is conceived to warrant, is at variance with the most fundamental principles of jurisprudence. God has made men unequal, and it is not the function of law to reverse His arrangements by giving equal things to unequal men. It is strange that a truth which, when thus stated abstractly, has all the characteristics of a truism, should be constantly set at defiance by those who claim to be the most advanced economists and politicians of our own day, though it was clearly enunciated and the consequences of failing to recognise it were expatiated on both by Plato and Aristotle, and assuredly by neither of them for the first time. The watchword of individualism is that God helps those who help themselves, but it is surely an exaggerated conception of individualism which goes over into Communism and teaches the lazy to help themselves to what belongs to the industrious. Communism being an invasion of individual rights is merely legalised theft; and as theft can be legalised only on pessimistic assumptions, which jurisprudence repudiates, Communism falls under the category of crime.

But Communalism, the holding of property by two or more individuals, or two or more families, *pro indiviso*, and co-operation

in its management, is a very different matter. It does not rest on false assumptions or necessarily encroach on individual rights, and it is possible that by recurring to it we may be enabled to solve some of the most pressing economical problems of the present time. The proprietary relations of the members of the same family always were communalistic. They always laboured in common, and shared the results. Even the patriarchal theory by no means excluded joint proprietorship and co-operative labour. The patriarch was not the sole possessor of the tent. It was not constructed by his single industry or for his single use. When he killed a kid, which his sons had caught for him, he killed it for the family. When he changed his pasture ground, it was a family migration. The interests of the whole family were so bound up together, that for his own sake he acted for the sake of others. He had no choice in doing so, for he could not stand alone. The extent to which his own will shaped the common policy of the family must always have depended on his own character and on the characters of those around him. Within the family, as without it, the weaker will and the more limited intelligence would go to the wall, the amount of friction occasioned by the process being greater or less in proportion to the less or greater perfection of the mechanism, and of the materials of which it was composed. Now it was this inevitable domestic Communalism, which, continuing to bind the pastoral tribe as it had bound the pastoral family together, passed over into the village communities which appear to have sprung up everywhere when the pastoral merged into the agricultural stage of existence. To suppose that individualism took the place of Communalism at this or any other stage of social development is one of those shallow notions by which history has been chopped up into fragments till all life has gone out of it. Individualism and Communalism have always existed, side by side, both amongst civilised and barbarous men. They are manifestations of those centralising and decentralising tendencies on which the social fabric depends, just as the physical fabric of the universe depends on centripetal and centrifugal action and reaction. If the social or economical balance has been disturbed by the preponderance of either individualism or communalism, the family relations are in no danger from its readjustment. If the land question can be solved, the rural districts re-peopled, and the sturdy yeomanry, which at the end of the sixteenth century constituted, it is said, one-sixth part of the whole population of England, restored to our fields by reverting to communal holdings in circumstances that do not admit of separate individual property, or amongst races that take more kindly to Communalism, both the life of the family and the life of the State will be gainers by the change. What we must be careful to provide against is the risk which will always exist of Communalism degenerating into Communism,

and impeding individual development and activity. There is no conceivable incentive to well-doing equal to the prospect of acquiring individual possessions and personal distinctions, and of transmitting these good gifts of God, as far as may be, exclusively to those who are nearest and dearest to us. Personal and family ambition are the mainsprings of progress, and any scheme of life which proposes to set them aside or to subsume them under what may at first sight appear to be the interest of the greater number, will lead not to stagnation only, but to retrogression. The communities that have risen highest have invariably been those which contained the greatest number of eminent men, and of families which continued for generations to hold the eminent positions which their ancestors had won for them. It is the rivalry excited by the presence and the example of such individuals and such families that gives an upward tendency to national life, and no passions are nationally so suicidal as the jealousy which would prevent their rise and the envy which would pull them down.

And this, gentlemen, leads us to consider a subject of permanent interest, and one which bears in a very special manner on the political and social questions of the hour—I mean the hereditary principle.

Even amongst those who profess to attach the greatest value to the family as a social institution, and who would be unfeignedly shocked at any proposal to encroach on the sanctity of the domestic relations, there are many who appear to think that the family ought to be limited to one generation. The ultimate social and political unit, they say, is not the family but the person; as advocates for personality they maintain that each man is entitled only to the fruits of his own activity, that the claims of his children to participate in them cease with the attainment of majority, and that his own right to devote his property to their exclusive benefit terminates with his life. He may do what he will with his own so long as it is his own, and if he pleases to support or to assist his adult children whilst he lives, good and well; but when he dies his proprietary rights die with him. In justice to the rest of the community, his children must start on their respective careers on the same footing as the children of other people. Even if they are permitted to succeed to his property, of which they are already probably in partial possession, it is regarded as absurd that they should be credited with his personal qualities, or that any attempt should be made to preserve for them the social or political position to which he had attained. It is by carrying out the principle of individualism in this direction, that the greatest inroads have already been made and are likely still to be made on the conception of the family.

That, in former times, the hereditary principle was adhered to in cases to which it was altogether inapplicable cannot now be doubted. When offices requiring rare and special gifts were attempted to be

transmitted from father to son, the whole community was injured, and the greatest sufferer of all was very often the son himself. After an insecure and unhappy tenure of a few years, he was laughed out of the place in which his father had been revered and honoured. If there is to be succession in such cases at all, it must be by open and unbiassed competition. But the fact that rare and exceptional gifts do not descend, or, at any rate, cannot be counted on as descending, is no proof that there are not other gifts of which for its own sake the community may well take cognisance that do descend, both by blood and by tradition. There is no more reason to doubt that there are good and bad breeds of men, than that there are good and bad breeds of dogs and horses. Nor do we require to go out of the national type in the one case, any more than we go out of the species in the other, in order to detect these differences. There are good and bad breeds of Englishmen and Scotsmen, just as there are good and bad breeds of bull-dogs and terriers. Moreover, the transmissible qualities are precisely those which are most indispensable for the everyday service of the State, and which consequently give the best claim to general precedence. They are for the most part, bodily and mental sanity, honesty, courage, perseverance, self-possession, presence of mind, tact, memory, acquisitive power, and general business capacity. The experience of this and every other country proves to us that these qualities frequently descend in the same families through many generations, whereas the endowments which make poets, philosophers, and artists seldom appear in anything like the same perfection a second time. In a greater or less degree they too depend upon temperament, and the temperament is hereditary. The tone of the family continues to be literary, philosophical, musical, or æsthetic; but the quality which we characterise as "originality" is too sparsely sown to entitle us to act on the presumption that it will twice fall to the share of the same stock. We speak of it as "the gift of genius," and in so far as it admits of analysis it may perhaps be defined as the power of penetrating to first principles by intellectual processes of which the individual himself is only partially conscious, and which he cannot fully explain to others. It trenches on that region of mystery which hides creative action from mere human observation, and this region it partially reveals. In this respect it resembles the gift of prophecy, and like that gift it is inexplicable and intransmissible. This assertion, if I have made it intelligible, I believe will be conceded without proof; but my former allegation, viz. that ordinary gifts are hereditary in particular families in an exceptional degree, I know will be called in question; and though our time does not permit me to go into it at any length, I shall adduce two or three instances in support of what I have said.

We live in an anti-monarchical age, when everything seems

to be drifting in the direction of republicanism. Let me ask you, then, to consider whether the royal families of Europe have not exhibited the qualities I have mentioned, and exhibit them now, to an extent which, if we consider the very small number of persons who have always composed them, is quite exceptional. If we take the present crowned heads, is there any reason to believe that from the millions of their subjects Presidents of their respective states could be chosen better qualified for their duties, either from a social or from a political point of view? Compare them with the Presidents of the United States; or compare the present Emperor of Brazil, or even poor Maximilian, whom the French deserted and the Mexicans murdered, with the Presidents of the South American republics. Has there been a President in France since the establishment of the present Republic, or during the short lives of any of its predecessors, with whom the Comte de Paris, or at any rate the Duc d'Aumale, might not be advantageously compared? I do not say, of course, that the rule in favour of these exalted personages is without many exceptions; but, if you will go over the list of them in the almanac for yourselves, I think you will be surprised to find what a high average they reach as regards the moral, and intellectual, and physical qualities I have enumerated. You will be struck, I think, with the same phenomenon if you look at the families of the nobility and of the ancient gentry, in this country more especially. It may be absurd to credit the eldest son in each generation with qualities which entitle him to exercise the rights and impose on him, whether he will or no, the duties of legislation. Still the average ability of the peers who actually take part in the business of the House of Lords has always been quite equal to that of the members of the House of Commons, and from the peerage alone I believe a senate, consisting say of fifty members, could be chosen, equal, if not superior to any senate that could be elected from the rest of the community. The superiority in ability which the latter might possess, would be more than counterbalanced by the greater dignity and influence that would belong to the former. As bearing on the question of the relative advantages of birth and election, we in Scotland ought not to overlook the fact, that at this moment we owe any little attention that is paid to our affairs by Government, and any little influence we possess in the councils of the nation, to the activity and patriotism of some half-dozen young peers, more than to the whole representatives we send to the House of Commons.

It is impossible to distinguish between the influence of birth and the influence of training in the production of the hereditary qualities of which I have spoken; but I think it may be said with safety that they could not be produced in equal measure by any training which did not commence with birth. Statecraft, like any other craft, may indeed be learned, and the capacity for the

higher duties of citizenship might be acquired far more generally than it is if the Faculties of Law in our Universities were developed after the continental model. To effect this is, as you know, one of our present aspirations as academical reformers. But there are many steps between the cradle and the Faculty of Law, and many of these steps can be taken with security only in the family leading-strings. For this reason I believe that, however perfect our educational system may become, the existence of what may be called political families will always be a prodigious advantage to the public service. But the disappearance of these families, be it desirable or undesirable, it is said, is inevitable. They are everywhere being swept away by the advancing tide of democracy. By many who do not urge the abolition of the second Chamber, the hereditary element in the House of Lords is pronounced to be a political anachronism, the removal of which is a mere question of time. It may be so, but if that be done, what, in my opinion, will follow will be this: in place of being a hereditary *class* of the community, as they have hitherto been, the nobility and the ancient gentry will become a hereditary *caste*,—just as the clergy will become a sacerdotal *caste* if you disestablish the Church. Separate from the rest of the community, scarcely accessible to the *nouveaux riches*, they will close their doors against the rest of their fellow-countrymen. You may deprive them of political power, but you cannot abolish them, for the simple reason that you cannot abolish the past. The present, moreover, is continually reproducing them. They are a natural product of every progressive community. Every man of eminence leaves a brood of them behind him. Even if he has no children of his own, his nephews and his nieces and his cousins divide, not only his property, but his *prestige* amongst them. Do what you will, you cannot bring them down to the common level the moment that the breath is out of his body, because they have formed friendships with those who were his friends, and they have formed family alliances and obtained appointments and taken root in all directions by his means. Rightly or wrongly, moreover, men will insist on ascribing to them traces of his character, and seeing in their features “the trick of Cœur de Lion’s face.” The more you envy them and even persecute them, the more you drive them into a corner, the more they become the objects of that social idolatry which you affect so much to despise. Excluded from political activity, cut off from the common life of the State, corrupted by luxury and enervated by idleness, they become a sort of fetishes, in the degrading worship of which those who hate them most, involuntarily participate. The attempt to eradicate the gentry is like the attempt to burn a book. When Suarez of Grenada published his *Defensio Fidei Catholicæ*, our Scottish Solomon, in a paroxysm of rage and fear in consequence of the regicide principles which it advocated, sent an embassy to Spain

and another to France demanding that it should be publicly burnt, and he did not fail to carry out his own sentence of death by the hangman's hands in London and in Edinburgh. The book was immediately reprinted at Cologne. But that was not all, for I myself bought a copy of the original edition a few years ago at our friend Mr. Thin's shop for half-a-crown!

Nor am I drawing on my imagination in describing to you the indelible character of social distinctions. It is a phenomenon which you may behold for yourselves by simply crossing the Channel and paying a visit to a well-known quarter of the city of Paris. According to the best information I have been able to procure, the old French Royal Family, now represented by the Orleans Princes, and the *noblesse* of the *ancien-régime*, continue to be the centres of society in Paris, just as much as under the monarchy. The official representatives of the Republic are nowhere, socially; and politically—very much in consequence of the want of social recognition—they appear and disappear at the bidding of the party wire-pullers, and before we have had time to learn their names their own countrymen have forgotten them.

Now at no period of the history of England have the leaders of society and the rulers of the State been separated by this unhappy cleft, and I most sincerely hope that no such separation will be occasioned either by the indiscreet assertion of the hereditary principle or by irrational outbursts of popular impatience. So far from being an alarmist, I am one of those who believe that we shall tide over our present difficulties, as we have tided over past difficulties of far greater magnitude, without revolutionary or even constitutional changes that will affect the good feeling which has always prevailed, and prevails now, between all classes. But there must be no excluded class either at the top or the bottom of the ladder; and, in our struggles to relieve an excluded proletariat, we must be careful that we do not create an exclusive aristocracy and a fawning and sycophantish plutocracy. The *mot d'ordre* to all must be "upward." All must not only be permitted but invited to ascend. Far from abolishing hereditary titles of honour, they ought, in my opinion, to be distributed even more freely than they are at present. Englishmen laugh at the poor little *bouton* of the Legion of Honour; but I would sooner trust a Frenchman who had it, than a Frenchman who hadn't it, and I believe France could better trust him. The chances are that he will be an honest fellow than plain Monsieur Chose, who calls himself *Monsieur de Chose*, because he is ashamed of acknowledging in his own person the *égalité* for which he is shouting all the day long in the case of other people. Titles of honour conferred by the State are the cheapest price at which patriotism can be purchased.

There are many, I know, who expect all such paltry expedients for the maintenance of existing social distinctions to be swept

away, and the social levelling which they favour to be effected by the abolition of the laws of primogeniture and entail, the breaking up of the great estates, which is expected to result partly from these measures, and partly from the depression in the value of landed property which the increased facilities for the importation of food will probably render permanent. I believe they are mistaken in both directions. Even if the subdivision of landed property were made compulsory, so long as freedom of sale was permitted, hereditary traditions would assert themselves by means of family arrangements; and cheaper modes of conveyance would very soon bring matters back to their present position. The ingenuity and cupidity of conveyancers may be trusted to circumvent any positive law as little in harmony with general feeling as a law for the compulsory subdivision of land would certainly be in this country. As for the breaking up of estates, I quite anticipate that the fall in the value of land will lead to the sale of their outlying farms by many proprietors who find it difficult to conform their habits to their present incomes. But so far from diminishing the influence of the great landed families, the sale of such portions of their estates as they are likely to part with, will, I believe, both strengthen their position and increase their numbers. From the small extent of this country, land will always be a luxury, and consequently will always be a bad investment. It has never yielded more than $2\frac{1}{2}$ or 3 per cent., and certainly will not yield more now, even to those who purchase it at its greatly reduced value. But from 4 to 5 per cent. can be got, with as good or perhaps better security than is now afforded by land, for mercantile investments or colonial mortgages. In this position of affairs the existing families hold their lands at a prodigious loss of income, to which, when coupled with the loss of capital from the fall in the value of the commodity, many of them will be unable or unwilling to submit. The obvious remedy is to sell their outlying farms, the management of which has become extremely troublesome, and which in many cases render their owners a mere imaginary gratification, and contribute nothing either to their personal enjoyment or to their social importance.

By this means their incomes will be restored to, or it may be augmented beyond their former amount, and they will be enabled without embarrassment to resume the bountiful expenditure to which they were accustomed. Nor is this all. The purchasers of these lands will be wealthy mercantile and professional men and colonists who have returned with fortunes to this country, and these persons will furnish a most valuable accession to the ranks of the very class which at first sight they may appear to have despoiled and dispossessed.

As matters stand at present, the plutocracy do really press hard on the ancient gentry, and threaten to push them from the place which they have hitherto held in public estimation.

The process may be seen in every country-side. The proprietors, no longer able to maintain their establishments, let their houses, and grounds, and shootings, and either go abroad, or take up a smaller residence elsewhere. The tenant whose means are well invested, or who is deriving an income from his trade or his profession, keeps up the old place; shoots over the farms from which the proprietor is drawing a scanty and precarious rent; hunts with the pack, towards the maintenance of which he contributes liberally, associates with the old friends and neighbours of the laird, to whom he and his are becoming strangers, and probably ends by purchasing the estate. Now all this may be prevented at the sacrifice of a few cherished traditions, which, I believe, are rapidly coming to be regarded as prejudices. The impoverished proprietor, whom I have described, can, if he chooses, at once change places with his wealthy tenant; he can return to the shelter of his paternal roof, he can resume the hospitalities of his ancestral hall, he can wander undisturbed through his grounds, he can shoot in his covers, he can fish in his streams, and may again be the master of the hounds himself, if he will consent to limit the acreage of his estate to what he can really use and enjoy. By ceasing to be a nominal proprietor, he can become a real proprietor once more.

But, though he consents to sell, will the other consent to buy? Will he give up the advantages which he derives from his lucrative investments for the charm which is said to cling to the proprietorship of land? Not wholly, I think. The lesson taught him by the fate of his former landlord will not be wholly lost on him. He will not purchase a great estate and play at the game of becoming a Feudal Baron. But the love of the country and of country ways is so universal, and the advantages which country residence affords in health and length of days are so unquestionable, that, as wealth and the facilities for locomotion increase, men of all classes will more and more tend to devote a portion of their means to the acquisition of permanent country abodes. Occasionally the present tenant farmers may purchase their holdings, but for any one who wishes to make a trade of farming the colonies will continue to offer greater inducements. More and more our home acres will be devoted to what, in a wide sense, may be called pleasure; pasture lands and plantations will take the place of corn-fields in the poorer soils, and new residences will be formed by men whose means of living comes from other sources, and who will cultivate their own lands for their amusement at what they themselves will be willing to recognise as a pecuniary sacrifice. It is this consciousness of the unprofitable character of all landed tenure which, when the great estates are sold off, will, I believe, prevent them from again accumulating. The richer a man is, the greater will be the sacrifice he is willing to make; but, if I am not mistaken, the passion for adding field to

field has received a final blow, and few men in future will consent to the loss and trouble attendant on mere nominal proprietorship. But the notion that a permanent and hereditary landed class will be thereby stamped out is one of the grossest delusions that ever entered the brain of a Radical stump orator. We shall have more proprietors, of all sorts and sizes, who will transmit their possessions to their descendants as their fathers did, or would have done, to them; and whether we have peasant proprietors or not, we shall have more peasants—because it is astonishing to what an extent the multiplication of resident, or even partially resident, proprietors tends to augment the population of a country district. I once made a pretty careful calculation of the effect in this respect of breaking up a single estate of £50,000 a year into two estates of £25,000, then into five estates of £10,000, then into ten estates of £5000, and so on. The rapidity with which population increased with subdivision was surprising. It is always of the subdivision of farms that we talk when the melancholy spectacle of roofless cottages meets our eye, whether in our Highland glens or our Lowland fields; but I believe the subdivision of properties will do far more for the restoration of the rural population than the subdivision of farms, and that it is only in conjunction with it that there is the least prospect of farms being subdivided.

Whether or not we succeed, by means of any of the schemes which at present occupy so much of the public attention, in substituting a proprietary for the old feudal yeomanry, the claim for fixity of tenure, which forms so prominent a feature in them all, must be regarded as a pleasing indication that the idea of the permanence of family life is deeply rooted in all classes of our people. I am aware that it is chiefly on economical grounds that fixity of tenure is contended for by the shallower part of our land law reformers, and that by them it is often sought by means which I regard as positively dishonest. To seek to convert a lease into a charter by some side-wind of legislation, under the pretence that it has become a political necessity, I regard as nothing less than an attempt to legalise confiscation. It would be the first step in the direction of the great scramble in which civilisation itself must perish. No political necessity can ever carry us beyond the ten commandments. I believe it to be impossible to convert paupers into proprietors at once, by any means whatever, because the improvidence which made them paupers would immediately make them cease to be proprietors; and surely it is neither in teaching them to be thieves, nor in the State itself becoming a thief on their behalf, that the transition stage is to be found. But, on the other hand, if fixity of tenure can be honestly attained—whether that tenure be proprietary or leasehold—there is no other method, either economical or educational, by which, in my opinion, an upward tendency may be so readily communicated. A historical people and a civilised people

have always been convertible terms, and it is only by rooting the historical sentiment in the family that its social and political influence can be secured.

But though the permanent tenure of land is certainly favourable to the development of historical sentiment, it is not indispensable to it. The Jews, who for the most part have no land anywhere, have always exhibited it in an exceptional degree. There are many tradesmen in this city who have long pedigrees. One family of jewellers, I understand, have exercised their craft without interruption since Queen Mary's days; and I knew a small farmer—a crofter I suppose I ought to call him—whose family had been tenants-at-will of the Dukes of Hamilton in Arran for three hundred years, and who, at that time, had no desire for any further security. It has often seemed to me that this invaluable sentiment might be more widely diffused if some simple and inexpensive arrangement for the registration of pedigrees were made at the Lyon Office in Scotland and at the Heralds' Colleges in London and in Dublin. In their present condition these institutions are mere playthings of the rich, but I see no reason why they should not be turned to wider and nobler uses. Such registration could not, of course, be made compulsory, but, in order to induce applicants to come forward, it might with great advantage be conducted at the public expense. The subject is one which I commend specially to the gentry, because in the times in which we live, far from intensifying class distinctions, I believe that their maxim with reference to the rest of the community, for their own sakes, ought to be, "Would to God they were all gentry!"

A COUNTRY LAWYER'S CHRISTMAS EVE.

THIS happened thirty years ago. Then I measured many inches fewer round the waist than I can pretend to do now; then my easy chair was enjoyable as a luxury,—it was not in those days, as it is to-day, almost a necessary.

It was Christmas eve. I had dined at hospitable old I——'s, —a pleasant party, and a sumptuous dinner, to which I, for one, with a naturally good appetite sharpened by the keen frost, had done ample justice. The wine was excellent, its supply unstinted, and our host had kept his decanters in rapid and effective circulation. So that, when we came to bid the genial old gentleman good-night, we were in that complacent and beamingly benevolent mood which such good cheer alone can induce.

Wrapt carefully and bulgingly though I was in overcoat and muffler, I could not quite repress a shiver as I left the warm and well-lit rooms, and stepped into the cold and pitch-black night. It was a contrast. The thermometer was far below freezing point.

Not a single star had the courtesy to come out to greet me; and as for the moon—well, but for the faith one comes to repose in the prophetic almanac, I should have concluded it gone from our sky never to return. Yet, as I briskly trotted along over the crisp snow, I was far from dispirited. I relished it. The cold only whetted my anticipation of the warmth to come. Positively I chuckled like a boy at the prospect before me; the cheering prospect of warm slippers (after my tight pumps) before a blazing fire; with just a “night-cap” before turning in; and then—the turning in. So I got very fleetly over the few hundred yards which separated my modest house from I——’s, and I was soon seated with all my late alluring anticipations now become delicious realities.

Quite a young man, I had but recently begun to practise as a solicitor, and was settled as such in the old county of P——, in the Scottish Highlands. After a term of waiting, endured with what patience I could command, business had begun to come in satisfactorily; and, as is natural in the new (of every species, including the proverbial broom), I was very attentive and anxious in regard to this budding practice of mine. But, for this Christmas eve at least, I meant to leave business behind in my office. I had locked up all recollections of it when I turned the key in my meagrely filled safe. Little resolve, indeed, was necessary to do that. My mind was comfortably filled with lingering recollections of my evening’s amusement, and it would be an engrossing item of business, a very self-important and forward item of business indeed, that could insinuate itself even edgewise into such a mind at such a time.

Eleven struck. I smoked the pipe of utter contentment with myself and all mankind. The fire made me pleasantly drowsy; and when the pipe should be finished and the tumbler empty, I would yield to the drowsiness. So I blinked at the fire, and it at me. By and by, as I was lazily winding up my watch, I was repeating to myself some of the jokes I had heard at old I——’s, and was indulging in a kind of ruminating laughter, when a name by association ——! woke me up in earnest! Through the stout barriers of snug fire, warm slippers, steaming beverage, and soothing pipe—through the brave outposts of a pleasant company, rare good cheer, and generous wines, lately enjoyed—brushing past resolution and elbowing aside habit—there rushed in on my sleepy brain, abruptly, rudely, and unannounced, one baneful thought of business, and dispelled all besides. I had duly summoned creditors and all others concerned for the day after Christmas; all the arrangements for the meeting had been carefully made. But until that moment I had forgotten all about the bankrupt himself. I had omitted to give him the requisite notice to attend for examination.

Gazing dejectedly at the watch which I held in my hand, I

went mechanically through the calculation that it wanted only thirty-six hours of the time fixed for the meeting. The insolvent gentleman, a farmer, was then lying asleep in his bed near the village of R—, just forty-eight miles from my easy-chair. No trains found their way into those remote regions in those days. There is not a telegraph even now. A stage-coach made the journey twice a week, but Christmas was not one of its days. The unsuspecting farmer could not be informed timeously or fetched timeously by the coach. I must send specially for him, and my messenger, whoever he should be, must be despatched at once. No time was to be lost. The roads, bad at any time, were peculiarly difficult during the winter months—if, indeed, they might not be all but impassable in consequence of the recent snow.

Very hastily I muffled up again, and without informing my slumbering domestics that I was going out, I made my way to the livery stables. The snow was falling now, thick and clammy; a gradually rising wind kindly assisting gravitation at times by fitfully hurrying the flakes to the ground. Few prospects could be less inviting to a man who had quitted the very essence of comfort.

The distance I had to walk was something under a mile. That allowed time for reflection; and I made such use of it. Strange and incredible though it may appear to the reader, true it is that before I reached the stables I had resolved to undertake the journey myself. I chose to face the severities of the weather—repelling though these were to a philosopher of my persuasion—rather than entrust to a postboy the rectification of a serious mistake. Not only would I be more active in my own interests than I could expect any mere hireling to be; there was also, at the turning-point of the journey, the farmer to be soothed and persuaded, and fetched back with me without loss of time. A postboy could not do that.

The ill-slept hostlers got me out a gig and a horse, with an alacrity which the most finished hypocrite could not have shown had he been about to perform the journey himself. They aroused the poor brute from a sound sleep and led him forth from a warm stable, so that I felt servilely apologetic towards him from that moment onwards. He had not at all taken in the situation, when I was obliged to put him in motion. He quitted the yard in a docile, but thoroughly dazed state. We passed through the badly-lighted streets without breaking their stillness, for the freshly-fallen snow made us glide along as silently as spectres. When we had cleared the town, and its few but companionable lights were receding rapidly, I felt (I must own) a gloomy feeling coming over me. It looked so black ahead. Penetrating farther into it seemed so desperate and comfortless, that, in spite of myself, my spirits sank. Reason myself out of the feeling I could not; it lowered on me and shrouded me like a mist. Had it not

been, truly, that half mechanically I had to keep urging forward my unwilling horse—had I been, for instance, walking and so dealing with my own will alone; had I not had to combat also that of another creature—I must certainly have turned my face at once and have sped swiftly back to bed. But I pressed the horse forwards, from habit, I suppose; and, not unnaturally, I and the gig continued to go forward too.

The thermometer must have been in a bad way. Before I reached the toll my fingers were so chilled and powerless that I could hardly get out my money. Not that I was at all hurried in the operation. The toll-keeper (tacksman, I beg his pardon) gave me ample time. Indeed, he took so very long to come out after he had at length apprised me of his awakening, that I twice took the liberty of shouting to prevent his falling asleep again. The cottage looked so comfortable when its light fell through the open door across my dark path, that for the moment I considered that grumbling toll-keeper with his lantern the most enviable man in the world. I would fain have held some parley with him; the situation was so lonely and depressing. But he had not devoted his leisure to dressing, whatever he did with it; his attire was scanty, and the "nipping and eager air" made him anxious to return to his couch. He opened the gates, let me pass through, took my money, shone his lantern into my face, grunted a brief meteorological remark, shut the gates again, went in, and banged his door. Diogenes ought to have kept a toll. The good old institution of tolls has recently passed away into the historical past. What has become of the toll-keepers, I have not been able in a single instance to discover. The houses now deal in sherbet and cooling non-alcoholic beverages for 'Arry on his Sunday afternoon walks. But whither have the keepers vanished? They were a class of men unique and by themselves; incapable, I should think, from their souredness and specialty training, of betaking themselves to any other occupation. No Act of Parliament could adequately compensate *them* for its interference with their vested rights.

And now the toll-gates were closed behind me! I felt more than ever desolate and dejected, regarding the gates as an insuperable barrier between me and all the known and wholesome world. I drove on doggedly. The snow drifted against me, covering my coat and every surface presented to the blast with its white and chilly flakes. Mile after mile passed, the road becoming, if possible, darker and drearier. We crossed the bridge which spans our broad and tossing river. The flood, black and ice-edged, was most hideous to look at intelligently at such a time; for to look at it intelligently meant ghastly suggestions, ghastly fears, and ghastly impulses. Next, we toiled our weary way up a long and steep incline, shut in on either side by a dense wood. That much I could see in spite of the dark. While the horse trudged along

at the slowest of equestrian walking paces through the deep snow, stopping at short intervals to breathe himself, my mental state was rendered still more distressing by my now realizing for the first time that I had left my house, left my town, without giving a hint to my domestics as to where I was going or that I was going anywhere! Vivid visions now haunted me of their consternation in the morning, when, after repeated calls unanswered, they should enter my room at length, and find it vacant! Then the news would spread. My friends would meet each other; they would compare notes, and form conjectures, and compile an elaborate explanatory story. And as they exchanged their Christmas greetings, they would discuss the news, and say how sad it was about S——, poor fellow, going home, just a little elevated, missed his way, fell into the river, etc. etc. Or, perhaps, some more charitable people would shake their heads and hint darkly at difficulties, clients' funds, absconding! I knew that the stable people would be late in the day in throwing their light on the subject. That light would be more than doubtful, except, indeed, in the direction of confirming the absconding theory. Altogether, these reflections and imaginings were most uncomfortable. Nevertheless, they had their good effect. I brooded less intently on every trying circumstance about me. I felt less sensitively the depressing character of my situation.

When thus absorbed in my reflections, I was startled by my horse stopping abruptly and beginning to tremble violently all over. Glaring at me wildly, fiercely, fixedly and most brilliantly,—placed just ahead of him,—were a pair of the most horrible eyes I ever saw. Positively I shook with terror, as violently as my horse. When I met their gaze, I could not withdraw mine. I felt my blood curdle and freeze, and I verily believe that my hair stood on end. The eyes—whatever may be the physical explanation of the lighting—shone clearly out from the darkness. I could see dimly and indistinctly the figure of the person to whom they belonged, looming a little darker than the black surrounding night. But the eyes were weirdly bright. They were turned on me “most constantly.” I could not speak. Nor, beyond violently trembling, could I move. I seemed incapable of anything but passive terror. The horse, no less agitated, seemed as powerless as myself. It sought neither to advance nor retire.

How long we remained so, I cannot tell; but the time seemed interminable. At last the spectre, for so I thought it, came towards the gig, stepped sedately into it, and sat down in the vacant place—all in absolute silence. As it did so, I could see more distinctly what manner of person it was. The results of this closer observation were not calculated to reassure me. A tall, spare man, with sunken cheeks beneath his awful eyes; long, bony, nervous fingers; his dress a thin black coat and grey trousers: no covering on his head—no gloves on his hands. Yet he did not

seem cold; and, somehow or other, the snow did not cling to him as it did to me. It seemed to shrink from him and fall aside. A strange figure to meet in such weather, at such a time and place. I still doubted his humanity most strongly; but my terror of him even as human was not a whit less intense and paralysing, when, as he stretched out his hands to take the reins from my grasp, I saw that they were red with blood! I resigned the reins even before he touched them, and the horse started at once. We drove on in silence several miles. The agony of terror which I then endured I cannot describe, and shall not attempt to do so. I vainly tried to throw it off from time to time by an attempt to believe that the hideous experience I was then passing through was only a dream—a dreadful nightmare; and that I should wake ere long to find myself snugly in bed, or even still dozing before my sitting-room fire. But the efforts were sickly, and proved ineffectual against the terribly real feelings and surroundings; and I abandoned them at length. Then I tried to bring myself to address the mysterious being beside me. As futile an effort as the other; I could not utter a sound.

He drew a blood-stained handkerchief from his pocket, and dried his forehead. Snow and frost appeared to have no effect on him—he was perspiring profusely! Then, without looking at me, he took my hat off my head and put it on his own. Whether or not this strange being was impressed with a sense of justice, and meant it as a compensation for the loss of my hat, I cannot tell; but he thrust into my pocket a peculiarly shaped jar (which I instinctively knew to contain loathsome leeches!), and three billiard balls.

We were now nearing a second bridge by which the road recrosses the river. My weird companion threw down the reins, as it seemed to me, on the first roar of the swollen current reaching his ears. He folded his arms across his chest, and stared sternly and moodily before him. Between dark rows of snow-laden trees, round a sharp turn, we went—and then the bridge rose before us; rose abruptly to the middle, and then dropped as abruptly beyond the middle—narrow, dark, and dismal. We reached the middle of it, and the horse almost stopped. The river rushed a perfect torrent below, crashing against rocks and banks, and dashing huge masses of ice furiously against every obstacle that had the hardihood to oppose it. My companion stood bolt upright in the gig, sprang on to the parapet, waved his arms wildly, and leapt into the torrent! Above all the roar and furious tumult I thought I could distinguish the ghastly splash with which the black waters received and closed over him.

Then my head swam round, and I lost all consciousness for a time—for how long, I had no means of guessing. My first recollection thereafter is of careering along at a rapid pace, the snow falling coldly on my uncovered head, my fingers numbed,

and my feet cold as icicles. My poor horse was at a good canter, with the reins kicking amongst his feet; the night as dark, the way as desolate as before. I made no movement to recover the reins or to check the pace. I was drowsy and indifferent. I cannot say that I was longer terrified or depressed. I was too drowsy to care much about anything, or to feel acutely in any way. I felt myself wondering if I was not dreaming, or rather gradually awaking from a dream. Then, too drowsy to settle the point with regard to the present, I seemed to feel that the former part, at least, of the awful night's experience was only a dream.

So for a mile or so, and then I saw, not very far off, lights! Imperceptibly again, I dozed away into unconsciousness.

The sequel—since it took place on Christmas day—need not take long to tell, for this paper is headed “Christmas Eve,” and has not undertaken to pass beyond that eventful night.

When I became conscious again, it was broad daylight and I was in bed. In a bed, but that bed a strange one. I could not, from the appearance of the room, tell where I was, but I afterwards knew it to be an inn. Two men, complete strangers to me, were talking in whispers. They were standing in the window, and I could hear the tenor of their conversation. It was, in brief, to this horrible effect, that I was “the man they wanted.” That much-sought-after individual had left a lunatic asylum “without leave first asked and obtained.” Probably mistaking them for eatables (say pickles), he had taken a jar of leeches with him; and had also been guilty of *asportavit* in the matter of the billiard balls of the establishment. Both these commodities had unmistakeably been found upon me. Then, in addition, I also coincided with the missing gentleman in the trifling eccentricity of ranging the country in December without a hat! Lastly, he had broken through a glass window. Some of the blood from his cut hands had been transferred to me. Conclusive, these people thought.

It was two whole days before I succeeded in establishing my identity with the humble solicitor in P—, and in proving my non-identity with the escaped lunatic.

There was a more tragical side of the adventure. My weird and mysterious travelling companion of Christmas eve was, of course, the missing madman, of whose dreadful end I had been an awe-struck witness. His body was never found. But my hat, which he had worn during the performance, was picked up from the river just at P—. This fact was taken (not unnaturally, I must concede) as furnishing the true explanation of my sudden disappearance; and for two whole days my friends believed me no more.

“VITIOUS INTROMISSION.”

IN a recent article mention was made of Dr. Johnson's argument upon the subject of *Vicious Intromission*, which, at the instigation of Boswell, he wrote in support of a strict adherence to the old and severe law, and in so doing opposed Lord Kames, who was inclined to the more liberal interpretation of modern times. From an examination of the decisions which have been given since Johnson's days, it will be seen that the Court have rather favoured Lord Kames' views upon this subject. The number of cases in which the plea of *Vicious Intromission* has been repelled is very considerable. It is one which is still taken from time to time, especially in the Small Debt Court. During the last few years, however, the Court of Session has hardly been called upon to pronounce any judgment involving a consideration of this legal doctrine.

Vicious Intromission, although to a certain extent regulated by statute (Act 1696, c. 20), has its origin in the common law, and is connected by Erskine with the *actio expilatorie hereditatis* of the Romans. According to him, it is the only passive title in moveables subjecting the intromitter to the payment of all the debts due by the deceased. Just because it is a passive and not an active title, the party who acquires it incurs all the responsibility without any of the benefit of a legal representative. There is no action competent at the instance of the intromitter, while his position as a defender is by no means a pleasant one. The severity of the Scottish law lies in this, that a limited intromission involves a universal representation in so far as the moveable estate of the deceased is concerned. Stair's doctrine, however, is that “the intromission must be universal; not that the intromitter must meddle with all the defunct's moveables, but must meddle *quasi per universitatem*.” To this view Erskine takes exception, and says the doctrine is “neither founded on reason nor supported by practice. The only *universitas* to be regarded in this passive title is the *universitas* of the moveable estate of the deceased; and, therefore, whoever intermeddles unwarrantably with a single subject that belonged to him, as a picture, a jewel, a piece of plate, must be understood to intermeddle *per universitatem*, and without doubt commits as great wrong when fraud is justly suspected as if he had carried off a sheep from the flock or a corn sheaf from the barnyard.”

But practically the opinions of these two jurists amount to the same thing, although they may base them upon different grounds. Stair says: “Intromission with one thing or some small thing will not infer this passive title;” while Erskine observes: “The penalty of vitious intromission being extremely severe and introduced as a check to fraud, is excluded in every case where equity interposes

for the intromitter, when, for instance, the value of the things intermeddled with is so inconsiderable as to remove all suspicion of fraud unless there be direct evidence, or at least pregnant presumption to the contrary." As an illustration of this view, he refers to the case of *Stark* (M. 9830), in which "the Lords found the defender's intromission with £7, 10s. Scots, being so small a sum, and but one single act, not relevant to infer vitious intromission." Another old case in point is that of *Wilson v. Smith & Armour* (M. 9833), rendered classical by the intervention of Samuel Johnson. It was an action at the instance of a creditor against the daughter of his debtor. The articles intromitted with by his daughter's husband seem to have consisted of "one trifling article of chairs, some mean body-clothes, and some old blankets." Boswell, with the assistance of his friend, made a vigorous stand against the modern tendency to find excuses for the intromission, and maintained that the idea of any distinction between a greater or lesser degree of vitious intromission was novel and without authority in the institutional writers. He was able to point to such a case as that of *Cochran v. Sturgeon* (M. 9825), in which the sale of some pepper and spices from her late husband's booth, although "for the supply and necessary entertainment of herself and her bairns in meat and drink," rendered an unfortunate widow liable as a vitious intromitter. But—alas for the inconsistency of the Court!—only in the previous year they had dealt differently with a widow who had sold several bolls of corn, and made somewhat free use of a flock of sheep—finding her liable "to make the said particulars forthcoming, wherewith she should be proved to have intromitted." "This was found," we are told, "because it was thought hard that so small quantity of intromission should bring on the whole burden of the defunct's debts on her, and to make her a universal intromissative to answer for all." As this latter decision, *Scot v. Livingston* (M. 9824), was given so far back as the year 1623, Boswell could hardly maintain that the doctrine which he opposed was of so very novel an origin. He was not successful in *Wilson's* case. The Court would appear to have taken a sensible view of the subject, and exercised an equitable jurisdiction.

Equity has found other means of softening the hardship of this law. Thus, as Erskine points out, "any probable title of intromission, though it should be in itself lame or imperfect, saves the intromitter from the passive title as it takes off the presumption of fraud. Oddly enough, in view of recent judicial proceedings, he quotes as an illustration of such a lame or imperfect title, letters of administration obtained in England. Other intromitters have been able to escape the penalty of passive representation under the excuse that the acts done by them were really necessary for the preservation of the deceased's estate. Nor does an action founded upon vitious intromission transmit in full force against the heir of

the intromitter. He, at least, is only liable *in valorem*." *Penman* (M. 9836).

Let us now take some further illustrations of this subject from more recent decisions. The case of *Scott v. Bellhaven*, reported in the first volume of Shaw, p. 30, is an instance of vicious intromission being inferred upon what may appear but slight grounds. Lord Bellhaven was found liable in the capacity of a vicious intromitter, because he had opened the sealed repositories of his deceased mother, and taken from them some articles of small value. The meagre report of this case contains, however, the following:—"Observed, that though the ancient rule as to vitious intromission be much relaxed, yet from all the circumstances, and particularly the breaking of the seals, the rule must be enforced."

Widows have, of course, been frequently sued as vicious intromitters, and, as already shown, with different results. The needy condition in which they too often find themselves, combined with a feminine ignorance of the law, render them peculiarly liable to the attacks of vindictive creditors. In one case, that of *Gardner v. Stevenson*, Feb. 26, 1830, 7 Sh. 600, Lord Gillies characterised the creditors' claim "as unjust, ungracious, and illegal. It would not have been sustained at any period of our law." In this case, the widow, a poor woman, had sold some articles belonging to her husband's estate, the value of which, however, did not equal the amount of certain preferable debts due by him. She was, moreover, decerned executrix-dative during the dependence of the action, which a creditor brought against her, and gave up the proceeds of the sale in her inventory of effects. In *Cunningham & Bell v. McKirdy*, Feb. 8, 1827, 5 Sh. 315, which Lord Alloway described as the hardest case he had ever seen, a widow was found liable under the following circumstances: She had continued in the possession of the moveable effects of her deceased husband,—had been decerned executrix *qua* relict, but did not give up inventories nor obtain confirmation; as executrix, she raised actions against debtors to her husband's estate, and in one of these obtained a decree under the qualification that she should confirm before extract; creditors, whose claim she had in part met with the funds realized by her, sued her in the capacity of a vitious intromitter for the balance still due to them. Judgment went against her; Lord Pitmilley remarking, that "unless this woman be held to have incurred the passive title of vitious intromission, I must hold that doctrine to be entirely at an end." The later case of *Thomson v. Elder*, Dec. 4, 1827, 6 Sh. 204, may serve as an illustration of the kind of special circumstances which will save a widow from the character of a vitious intromitter. Here there was due intimation that the widow was not to represent the husband, and a meeting of creditors held, with whose consent she retained possession of certain furniture while

she at the same time paid debts exceeding in amount the sum at which this furniture had been valued.

The Court seem to have recognised a distinction between *taking possession* and *continuing possession*. Thus in *Thomson v. Jones*, Dec. 9, 1834, 13 Sh. 143, Lord Gillies said, "The character of her intromission is not accurately described in the note of the Lord Ordinary, when his Lordship says that she *took possession* of the furniture and machinery. The fact rather was, that she continued possession, and the difference is not immaterial in a question as to the *animus* with which she acted."

Lord Balgray remarked, "If this were to infer vitious intromission and universal liability, I conceive it would produce the most injurious consequences to that great portion of the population of this country which consists of the smaller tenantry, and miners, manufacturers, and shopkeepers. It is not to be expected that amongst them, the moment that the breath is out of a husband's body, the widow is to cede possession, or make up a legal title." The true principle, he goes on to say, which creates the severe liability consequent on vitious intromission is, that such intromission has been fraudulently bad. Where it is clear, as in this instance, that there is no fraud in the case, there is no universal liability incurred. But if this be the sound principle, then numerous cases have been wrongly decided. For example, in *Cunningham & Bell's case*, there was no fraud on the part of the intromitter; on the contrary, it was considered a very hard case for her, and the judges evidently had to suppress their own strong feelings of compassion, out of a desire to act consistently with what they believed to be the law of the land. Lord Mackenzie, who took the same view as Lord Balgray, in deciding *Thomson v. Jones*, actually seems to have thought that the burden of proving fraud lay upon the pursuers. At least he uses the expression, "there is no proof of fraud." In the later case of *Dudgeon v. Dudgeon's Trustees*, March 9, 1844, 6 D. 1015, a widow who had sold certain articles of furniture was found not liable as a vitious intromitter, although held bound to account for the value. In this case, however, there was confirmation by an executor-creditor. In *Simpson v. Barr*, reported at pp. 33 and 478 of 17 D., we find the question of vitious intromission by a widow raised in rather peculiar circumstances. Here a widow who had a certain provision under her marriage-contract took possession of her husband's personal effects. She herself made no claim against the representatives of her husband for her provision; but, nearly forty years after his death, she assigned her claim, and her assignee subsequently adjudged certain subjects which she had liferented, and disposed them to third parties for onerous considerations. The representatives of her husband ultimately brought an action of reduction and declarator, and under it this point was discussed, viz. whether

the plea of vitious intromission is competent to the heir of a person deceased, and when it is pleaded by way of exception. This question was decided in the affirmative. What the representative of the husband here maintained was, that the vitious intromission of the widow had extinguished *confusione*,—a debt due to her by her husband under their contract,—and that consequently having no claim left to assign, her assignation carried nothing, and all that had followed upon it was null and void. Vitious intromission, it may be held as decided, can be pleaded by way of exception, when there is no other way of pleading it, *i.e.* when circumstances do not admit of a direct action. And while the heir of an intromitter cannot be made liable in the penalty of intromission, this rule does not apply to the “presumed payment or satisfaction of the intromitter’s own debt.” Lord Rutherford thus puts it, “The case does not depend simply upon the rule *actio penalis, non transit in hæredem*, but upon the other rule that the defence by exception is perpetual. Where vitious intromission must be pleaded in defence, the situation of parties is entirely changed.” Upon the subject of vitious intromission, Lord Rutherford also remarked, “I cannot agree in what is said about intromission, that the amount is of not the least consequence, and that a party may be liable as a vitious intromitter, because of a minute intromission, and for any amount of debt. To some extent that is true. What the tribunal by whom the question comes to be considered—whether a jury or this Court—have to look to is the character of the intromission more than its amount.”

Although, to quote the words of Erskine (iii. 9, 51), “an intromitter incurs no passive title if one has been, previously to the intromission, confirmed executor to the deceased,” this does not apply when the confirmation has been by an executor-creditor, and the party intromitting does not claim under him. The law upon this point has been made clear by the old Scotch statute, 1696, c. 20, and was applied in the case of *Montgomerie v. Boswell*, Dec. 20, 1841, 4 D. 332.

Whatever may be thought as to the soundness of the principle, there is no doubt that this doctrine of vitious intromission has given rise to much litigation of a very petty and contemptible character. The pages of Morison, under the head of “Passive Title,” form a melancholy record of wretched disputes, engaging nevertheless the highest talent of our bench and bar. The inconsistent decisions—manifesting at one time a rigid adherence to the letter of the law, at another the existence of sentiment when it had no right to assert itself—cannot be said to confer much credit upon our judges. In the future, we can only trust that our Supreme Court will rarely be called upon to deal with the vitious intromitter.

Reviews.

Proposed Bankruptcy (Scotland) Act. Drafted by JOHN DOWNIE, Writer, Glasgow, and DAVID BIRD, Jun., Accountant, Glasgow. Wilson & McCormick, Glasgow. 1884.

THIS little publication is the product of the combined work of a lawyer and an accountant, a combination very appropriate for such a subject as bankruptcy. In their preface the drafters, after paying a well-merited compliment to the Bankruptcy Act of 1856, tell us that revision and consolidation of the whole bankruptcy laws are much needed, especially since the passing of the recent Cessio Acts. They then refer to the danger (to us a startling revelation!) which they say our bankruptcy laws incurred of being superseded by Mr. Chamberlain's Act of last year; and they give a summary of reforms which their experience in existing bankruptcy practice has suggested to them. The proposed statute itself consists of 180 sections and 15 schedules, embodying the changes which the drafters think expedient.

Among the reforms suggested are—(1) the extension of the modes of constituting notour bankruptcy, so as, apparently, to make it square with what is called in England an "Act of Bankruptcy;" (2) the abolition of the Bill Chamber as a Bankruptcy Court of first instance, and making petitions for sequestration competent only in the Sheriff Court; (3) shortening the periods of time for closing accounts, notices, and payment of dividends in sequestration; and (4) the abolition of *cessio bonorum*, and introduction of a more economical and simple procedure for winding up small estates. Other reforms are suggested, some of which, however, have been already given effect to by the recent Bankruptcy Frauds and Disabilities Act.

As regards the drafting of the clauses, it is on the whole carefully done, though obviously Mr. Chamberlain's Act has been a good deal referred to. We have observed, however, several errors which ought not to have been made, and which would seem to show some want of knowledge of the subject on the part of the writers. Thus a bad beginning is made, for in sec. 2 (the clause repealing existing enactments) we find the Bankruptcy Act of 1814 and the 2 and 3 Vict. c. 41 included—statutes which were long ago repealed by the Act of 1856. So, in sec. 4, the writers propose to enact that the "masculine" shall include the "feminine" and the "singular" the "plural"—oblivious of 13 and 14 Vict. c. 21, sec. 4. So in the definition of "registrar," in the same section, we should like to know what is meant by the "*district* in which the debtor resides or carries on business."

While making these criticisms, however, we gladly acknowledge that there is considerable merit in the work. It has been under-

taken from a most praiseworthy motive, and the writers deserve our thanks. Some of the clauses suggest useful reform. For instance, we are quite of opinion that the granting of gratuitous or fraudulent preferences should be a mode of constituting an insolvent debtor "notour bankrupt." We can't say we care so much for the indefinite term "stoppage of payment by the debtor," so the periods of time required for various stages in the sequestration process are advantageously shortened in some cases. The drafters' suggestion, however, as to a "registrar" seems to us useless. The office of accountant in bankruptcy is an excellent one, and the holder of it supervises, or ought to supervise, trustees in sequestration very completely. It is a very different office from that of the comptroller of bankruptcy in England under the old law.

With regard generally to the consolidation of our bankruptcy laws, we think that at no distant date it must take place. There are at present about ten bankruptcy statutes in force in Scotland, besides a good deal of common law. But we are disposed to wait a little yet. There is nothing worse than tinkering at laws; and this is especially true of such a subject as bankruptcy. In England they have done this too much. The Act of 1869—drafted, we believe, by Sir G. Jessel—was heralded by a great sound of trumpets, yet after only a dozen years its distinctive provisions have been declared a failure and thrown overboard. How Mr. Chamberlain's Act will succeed time will show. Complaints about it already are not wanting, and some of them are not without substance. Better let us wait a year or two in Scotland, and observe how this Act thrives, and then we can more confidently proceed to amendment, and at the same time hope for an assimilation that may produce a bankruptcy statute, similar to that which has recently so successfully consolidated the laws relating to Bills of Exchange.

The Laws of Insurance—Fire, Life, Accident, and Guarantee; embodying Cases in the English, Scotch, Irish, American, and Canadian Courts. By JAMES BIGGS PORTER, of the Inner Temple and South-Eastern Circuit, Barrister-at-law. London: Stevens & Haynes. 1884.

THE author of this book has brought together a mass of decided cases upon a branch of law which has undergone a great deal of discussion and elucidation in the courts within late years. The immense development of insurance business in the British Isles has led to an increasing number of points being raised. It is somewhat interesting to note that, on the one hand, we owe little or nothing to continental systems, some of which formerly expressly forbade life insurance; and, on the other hand, there is

no branch of law on which American decisions are more often referred to. In the elaborate works of American lawyers, every possible question relating to insurance seems to be stated, and its decision rested on the judgment of some Court. Here the cases, especially of fraud, have not been so numerous, and without reference to American cases gaps would necessarily occur in any book founded as Mr. Porter's is almost entirely on case law. The citation, then, of American cases will, we doubt not, be found useful, but the reader must beware of reposing too much confidence in them. The weight of an American decision varies with the character of the Court by which it is pronounced, and no one but an American lawyer can tell whether the judgment is one which is really authoritative. The works, on the other hand, of American jurists have a higher claim on the consideration of Scottish lawyers.

Apart from the practice of fire, life, and accident insurance being carried on by the same companies, we do not think that there is much advantage in combining in one treatise an exposition of the law relating to all of them, and yet not treating of marine insurance. Fire and marine insurance are both contracts of indemnity, although there are differences as to the extent of the obligation to indemnify. The definition of marine insurance as given by Arnould, is a contract whereby one party for a stipulated sum undertakes to indemnify the other against loss arising from *certain perils or sea risk*, to which his ship, merchandise, or other interest may be exposed during a certain voyage or a certain period of time. If for the words in italics the word "fire" be substituted, the definition applies to a fire insurance, but it could not be made to apply to a life insurance. Accordingly, Mr. Porter finds himself obliged to make frequent reference to decisions on maritime policies. To a large extent he treats of life insurance, and yet in his opening page he says: "The controlling principle in insurance law is indemnity, and by reference to that principle most difficulties arising on insurance contracts must be settled." He qualifies this in the following sentence, by excepting insurance on life; but after discussing the principle of indemnity, he turns to life insurance, and says it "is *perhaps* an exception" to this general principle, while it is really founded on a totally different principle. In effecting a life insurance no one thinks of indemnity, not even in the case of a policy on a debtor's life taken out by a creditor. The creditor desires to provide himself with a security, and all that the law requires is that he shall have an interest at the date of the policy, not at the date of the death of the insured. It would have been much better either to have treated of all the different classes of insurance, in which case they would have been naturally divided into two, contracts of indemnity, and contracts for payment of money on the happening of a contingency; or to have taken up one or other of

these classes. There would not then have arisen the confusion which the adoption of indemnity as the ruling principle has occasioned. We also think that the author has not kept sufficiently distinct his comments on the principles underlying the various contracts, and those on the meaning and effect of clauses, modifying or extending these principles. Occasionally we notice a divergence into irrelevant matter. Thus in the chapters on "Companies" there is a disquisition on the power of a company to hold land, and on the question whether land held by an unincorporated company is an interest which falls under the provisions of the Mortmain Act; and at p. 354 the following curious mistake is made, arising out of the misreading of a case there cited, viz.: "The distinction between corporation and unincorporation seems now immaterial."

We do not doubt that *The Laws of Insurance* will be found of much use, especially from the copious references to decided cases in the United Kingdom and America.

Principes de Droit International. Par J. LORIMER, Professeur de droit de la nature et des gens à l'université d'Edimbourg, etc., traduit de l'Anglais par ERNEST NYS, Associé de l'Institut de Droit International, Juge au tribunal de 1^{re} instance de Bruxelles. Bruxelles, 1885.

M. NYS has rendered Professor Lorimer's *Institutes of the Law of Nations* accessible to the French public. It is scarcely accurate to describe his book as a translation; for, in the first place, he has abridged the original work; and, in the second place, his version is a free paraphrase. He has condensed the argument; and he has omitted notes, references, citations, and appendices.

These changes have been made with great discretion, and seem in no way to interfere with the lucidity or cogency of the argument. We miss occasionally, however, that geniality of style which is so marked a characteristic of the original work, and we cannot regard the disappearance of the indices with approval.

Professor Lorimer contributes an interesting preface in which he discusses the relations of theology and philosophy in Scotland, and indicates his own point of view, and the character of his method. He concludes with a cordial recognition of the value of his friend's work and of the excellence of its execution.

Appeals from the Convictions and Orders of Justices. By JOHN G. TROTTER, Assistant-Clerk to the Justices, Guildhall, London. London: William Clowes & Sons, Limited.

THE leading purpose of this work (which is intended for use in England) is "to be a book of reference and guide to parties desirous of informing themselves, without delay, as to whether they

have a right of appeal to the Quarter Sessions." The author states in his preface that the difficulties in the way of obtaining reliable information on this subject necessarily checks a great number of appeals. It may be doubted whether that is an unmixed evil; but as within certain limits a power of appeal operates as a wholesome check upon inferior Courts, it is only proper that parties affected by the judgments of such Courts should have the means of speedily and accurately ascertaining their rights. Mr. Trotter's work presents in an unpretentious and clear manner all that is necessary to assist parties in taking and insisting in an appeal to General or Quarter Sessions. Chapter 1 contains all necessary information as to the right of appeal, the parties to the appeal, the Court to which the appeal lies, the notice to be given, the grounds of appeal, and "the recognisance." Chapter 2 deals with the procedure at General or Quarter Sessions; and chapter 3 with the enforcement of the judgments of the Sessions. The arrangement seems to be very much that adopted in Burns' *Justice of the Peace v. Appeal*, but the information is presented in an accessible form, and the notes bring the decisions down to date. In connection with those chapters, it may be mentioned that the work contains, in an appendix of about a hundred pages, an exhaustive alphabetical list of penal statutes, showing in a tabular form the terms of the appeal clauses, if such exist, and the procedure at Quarter Sessions. There are also printed in chapter 5 three important statutes, 12 and 13 Vict. c. 45 (Baines' Act); 3 Geo. IV. c. 46; and the Summary Jurisdiction Act, 1879, 42 and 43 Vict. c. 49. It would have been better, we think, had these statutes been placed in an appendix. There is one respect in which we think the work might have been made complete and distinct, and that is in regard to the various ways in which the judgments or proceedings of the Justices, whether in Petty or Quarter Sessions, may be brought before a superior Court; whether by writ of *certiorari*, by a case stated on a point reserved, or by a case stated "on a point of law" under 20 and 21 Vict. c. 43. All these matters are dealt with or touched upon in different parts of the work, but not so clearly and methodically as might be desired, having regard to the importance of the subject. Taking the work as a whole, we think that it will prove a useful and valuable guide for the parties for whose use it is intended; and no doubt, in a second edition, Mr. Trotter will find it worth his while to extend its scope in the direction we have indicated.

Madness and Crime. (Reprinted from the *Medico-Legal Journal*, N.Y.) BY CLARK BELL, Esq., President of the Medico-Legal Society of New York.

WE have received in advance the proof-sheets of this paper, which was recently read before the Medico-Legal Society of New York.

and which is to appear in the Journal of which its author is editor. The paper deals with a vexed subject, and it cannot be said to contain original matter. It does not appear, indeed, that its author has the intention of offering any original contribution to the controversy. American readers, however, will find in it well-chosen and extensive quotations from recent English sources, arranged in a convenient and instructive form. Mr. Clark deals in this way with the recent trials in this country of Gouldstone and of Cole for murder,—quoting from the subsequent discussion which was carried on in the *Times* by high medical authorities. The writer also has some remarks to offer on the American case of the notorious Guiteau, who assassinated President Garfield. The remainder of the paper is devoted to a laudatory review of Sir James Fitz-James Stephen's dicta on criminal responsibility, as laid down in his great work on *The Criminal Law of England*.

Obituary.

ROBERT KERR, Esq., Advocate, whose death took place on Saturday the 25th ult., was the eldest son of the late Mr. Andrew Armstrong Kerr, cash-keeper of the Royal Bank of Scotland. He was born at Edinburgh on 3rd July 1843, and was thus, at the time of his death, in the forty-second year of his age. His early education was received at Mr. Oliphant's School, Charlotte Square, from which he passed to the High School. At the latter he was a pupil of Dr. A. H. Bryce, and of the Rector, Dr. Schmitz. After completing his course of school studies, he entered the University of Edinburgh, where he attended the Arts classes, and subsequently entered the Faculty of Law preparatory to his chosen profession as a barrister. While at college he took a warm and active interest in the Dialectic Society, of which he became one of the most prominent members. Early in 1866 he was called to the Bar, where he practised for six years. In April 1872 he was appointed by the Earl of Kimberley, on the nomination of Mr. (now Lord) Young, then Lord Advocate, to be Judge of the Mandeville District of the colony of Jamaica, presiding subsequently in other District Courts of that island. Judging from the expression of public opinion as represented by the newspaper press there, which is distinguished by thorough freedom of speech, his services to the colony in the administration of his judicial office were always estimated as of an unusually high order. After three visits to this country, principally on the ground of ill-health, he finally left Jamaica in March of this year. In the Legislative Assembly, on the consideration of the Bill for awarding him a retiring allowance, he was very highly complimented for his services by the Colonial Secretary and by private members.

He did not live, however, to be gratified by this marked appreciation of his conduct and character, for his health had been so shattered by repeated illnesses, that within a few months of his arrival in his native city he passed away.

Mr. Kerr was a great lover of books and of literature. His reading was of great extent and of all kinds. He also entered the field on his own account; for in addition to occasional contributions to periodicals, he came out as a novelist, under a *nom de plume*, in 1868, when his first work, *Charles Stennis, Writer to the Signet*, was published. This was followed in 1872 by another novel, *Dower and Curse*. His uncertain health interfered with further efforts at publication, but he is understood to have left an amount of completed MS.

JOHN GORDON MAITLAND, Esq., Advocate, died at Duns on the 8th ult. We cannot allow the curtain to fall on the life of Mr. Maitland without paying a slight tribute to his memory in the Journal. He was born in 1848, and was the only son of the late Mr. Kenmure Maitland, Sheriff-Clerk of Midlothian. His father was celebrated for his ready wit and play of graceful fancy, and was well known as the author of the libretto of several of the most successful pantomimes that were ever produced in Edinburgh. His son inherited no small share of his father's genius. He was called to the Bar in 1873, and though he never attained to much practice there he made many friends. Few of his contemporaries will forget his unfailing courtesy of demeanour and kindness of heart. Constitutionally delicate, he never enjoyed robust health, but he always appreciated and relished the society of his friends. He invariably had a pleasant word and a kindly greeting for every one he met, and few men in the Parliament House were more liked. In 1879 he was appointed Procurator-Fiscal of Berwickshire, and he performed the duties of his office with care and attention. His health, however, latterly broke down, and he died at the early age of thirty-six. He married some years ago a daughter of R. H. Wyndham, Esq., the late popular and respected manager of the Theatre Royal, Edinburgh, and is survived by her. Not a few of his comrades at the Bar will remember with fond regret the bright and amiable spirit of him who has left them, and the many hours made lively by the cheery talk and genial humour of one of whom we still think as "Jack" Maitland.

The Month.

Curiosities of the Law.—We once amused ourselves, if not our readers, by publishing some specimens of "fine writing" by the judges. At the risk of extending vacation topics beyond the proper bounds, we venture to add a few examples. Chief Justice Jackson, of Georgia, has such a way of putting things that we suspect he must be descended from "Old Hickory." In *Hussey v. State*, 69 Ga. 54, an indictment for keeping open a tippling shop on Sunday, he thus discoursed: "The door on the street, through the bar and office room into the restaurant, was kept open to the extent that any visitor had only to push it and go in, and tinkle in the restaurant. The counter, where on other days drinking could be done, was covered by canvas from the ceiling to the floor, so as to be invisible itself, and to conceal the bottles on shelves behind, and on it in brazen letters was the announcement 'Bar closed,' and all the drinking was carried on in the rear and restaurant room. This fact, that the ostrich thus hid his head in the sand, and thereby imagined that his body was all covered too, is absolutely assigned as the legal reason why he was not visible to the keen eye of the law, which penetrates and despises all subterfuge and deceit! But one witness, though the canvas tried to hide the bird's head, actually did see poked out through a sort of aperture or window, the bill or beak which let out the liquor from the bar to servants in the restaurant. So that the foolish bird did not even keep all his head hid all the time! It makes no difference in law whether the place be called a bar-room, or a glee club resort, or a parlour, or a restaurant; if it be a place where liquor is retailed and tinkled on the Sabbath day, with a door to get into it, so kept that anybody can push it open and go in and drink, the proprietor of it is guilty of keeping open a tippling house on Sunday." But after all, it seems to us that Judge Manning, of Louisiana, "takes the cake" in this respect, to borrow a phrase from the world's people. He makes the 35th *Louisiana Annual* very lively reading. The following are brilliant examples: In speaking of a man afflicted with a cancer in the throat, in *Czarnowski v. Zeyer*, page 797, he says: "The stricture became so complete, and the cesophagus so rigid, that nourishment by the mouth had to cease. Enemas would not answer as a substitute. The man was in danger of starvation. Food around and before him in abundance, and no power to appropriate it—a modern Tantalus sitting on his own hearth-stone." Tantalus sitting before the fire, and beyond the reach of enemas, is truly a piteous object. The judge is not patient with technical objections. In *State v. Johnson*, page 843, he says: "If Courts should tolerate

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such verbal objections, the criminal pleader might exclaim with the Melancholy Dane, 'We must speak by the card, or, by'r lady, equivocation will undo us!'" In *Bourdier v. Railroad Co.*, page 949, speaking of a taking of lands without consent, he says: "The dazed plaintiff was roused from his attitude of waiting for his permission to be asked by the scream of the locomotive." We cannot recall anything more vivid than that, unless it is the next. In *City v. Roos*, page 1011, holding that a charge of keeping a bawdy-house in an indecent manner need not specify the acts of indecency, he observes: "The experience of the city fathers in that domain is doubtless so limited, that in drafting an ordinance which should comprehend all the indecent convolutions of lascivious cyprians, they would be forced to put fancy on the wing, and imagine postures they never beheld. This would be dangerous occupation." In *Tilton v. Railroad Co.*, page 1072, on the subject of signing a petition to continue a nuisance, he says many "sign it with the same indifference and facility that they would sign a petition for the pardon of a criminal, or for the execution of a saint." In *Rihert v. Bataille*, page 1173, he says: "So far as these two are concerned, we may repeat here the adjuration of the priestess to the intruder into the sacred grove, quoted years ago by the great Chief Justice of this Court on a similar occasion:

'Procul, O! Procul este profani,
... totoque abistite luco.'

By the way, we take it for granted that the printer is responsible for "sticking in the back," in the opinion on page 795, on a question of construction of contract, as we cannot conceive that such a reprehensible mode of assassination has anything to do with such a question. Judge Manning applies to a lawyer who sued for malicious prosecution the maxim, *de minimis*, etc., in *Maille v. Lacassagne*, page 595, as follows: "The plaintiff is the only witness for himself. He has been practising law since November 1880 or 1881. The date is very recent, and yet his knowledge of so interesting an event is so misty that he does not fix the year with precision. He has not lost any business in consequence of the defendant's charge against him, and his outlay, as stated in a bill of particulars, has been \$2.60 for newspapers, \$9.75 for car fare and extra clerk hire, and \$1.50 for mail matter and telegrams, and even these items are reduced upon his cross-examination to 80 cents for newspapers, 10 cents for car fare, 12 cents for postage, and 30 cents for a telegram. The whole affair is so puerile that it seems unaccountable that the counsel on each side should have wasted over twenty pages of printed brief upon it." But inasmuch as the lawyer got a verdict of \$450, which was affirmed, he probably does not much care for the judicial sarcasm.—*Albany Law Journal*.

A Caution to Directors.—Directors of companies who are neither lawyers nor men of business are so liable to get into trouble through accepting a directorship, that it is somewhat remarkable that it is as easy as it seems to be to secure directors for the numerous companies which are constantly being floated. Case after case is reported, not merely in the legal periodicals, but in the daily newspapers, which illustrates the liabilities of directors, but still no warning appears to be conveyed to those whom it concerns. One of the latest instances of this kind has just been reported (*Re The Carriage Co-operative Supply Association; Roberts' case*, 51 L. T. Rep. N. S. 286), and shows very clearly how a gentleman of undisputed integrity, and of considerable ability in his own vocation, may expose himself to all sorts of risks if he goes on the board of a joint-stock company. The circumstances were not precisely of the ordinary type, but at the same time of a kind not unlikely to happen again. The gentleman with respect to whom the application was made was a major-general in the army, a distinguished officer and a man of honour, who joined with four other persons to constitute the board of a new company, the nature of whose intended business is indicated by its title. As it turned out, the four other persons were all impecunious, but this was probably unknown to the general at the time. These five intending directors sanctioned an agreement by which promotion money was to be paid to the promoter of the company, partly in cash and partly in fully paid-up shares, and a week later the company was fully incorporated with articles of association, which made the five gentlemen above referred to the first directors, and required each of them within three months after his appointment to hold as his qualification at least twenty shares in the company. None of the directors, in fact, purchased any shares in the company at all, but each of them, with the knowledge and acquiescence of the others, accepted from the promoter as a gift twenty of the fully paid-up shares which had been allotted to him as part of his promotion money. Under these circumstances it was clear, upon the authority of various decisions of the Court of Appeal, that each director was liable to pay the company the par value of the shares he held, the company being able to claim the money, either on the footing that the shares had never been paid for, or else on the footing that they had been paid for with the company's money. But the liability of the directors did not rest here, for upon the authority of other cases it was held that each of them was not merely liable for the price of his own shares, but that all were jointly and severally liable for the whole price of all the shares; and as all the other directors professed inability to pay, the whole of this liability was cast, at all events in the first instance, on the unfortunate officer who, with the best intentions, had stepped beyond the limits of his own vocation.—*Law Times*.

The Mignonette Case.—The result of the trial of the prisoners in the case known as “the *Mignonette* case” has been full of surprise to the legal world. The facts of the case are so notorious that it would not be needful to set them forth if it were not for the necessity of taking a cold legal view of their character. Three men and a boy had been for many days exposed to the pangs of hunger in an open boat upon the ocean. Finally matters came to such a pass that the captain proposed that lots should be cast in order to determine which of the four should be killed in order that the three survivors might sustain life upon his body. The proposal was demurred to, and on the following morning the captain killed the boy. Finally, upon their own confession, and on the evidence of one of the three survivors, the two remaining men were tried before Baron Huddleston, at Exeter, upon a charge of murder. The learned judge, both in his charge to the grand jury and in the course of the trial, expressed in unmistakeable terms his opinion of the legal character of the act committed. He had no precedent before him. The case mentioned in Puffendorf is of doubtful authority, although the text undoubtedly leaves an impression that “the judges” mentioned were the English judges. But, in any event, it was a case characterized by different circumstances, for there it is reported that lots were cast. In the present case this was not done, and, while we agree with the learned judge that the law would be the same whether lots were cast or not, it is impossible so far to blind ourselves to popular feeling as to pretend to be unaware that the public mind would have been more kindly disposed to these men if they had committed their lives to the doubtful chance of the ballot. *Holmes’* case, again, is not in the least parallel to the present, and the Criminal Code Commissioners, while they obviously foresee the possibility of circumstances such as surrounded the survivors of the *Mignonette*, distinctly refrain from an expression of opinion. Therefore, as all men and all lawyers thought, no course remained but to apply the terms of Lord Coke’s definition to this novel combination of facts, and to leave the Crown to exercise the prerogative of tempering justice with mercy. This has not been done, and the learned judge has preferred to return to the old form of a special verdict. In fact, a special case has been stated in terms which have been approved by the jury, and will be discussed by the judges at an early date. This is a most unusual course for the learned judge to have adopted, and it is also somewhat puzzling. Mr. Justice Stephen, in his *History of the Criminal Law*, writes thus: “Special verdicts have now gone almost entirely out of use, having been superseded by the establishment of a court called the Court for Crown Cases Reserved.” According to the 1st section of the statute establishing that tribunal (11 and 12 Vict. c. 78), the existence of a conviction is a condition precedent to bringing its jurisdiction into operation: “When any person shall have been convicted of any treason felony

or misdemeanour before any court of oyer and terminer, or general gaol delivery, or court of quarter sessions, the judge or commissioner, or justices of the peace before whom the case shall have been tried, may, at his or their discretion, reserve any question of law which shall have arisen on the trial for the consideration of the justices of either Bench and Barons of the Exchequer." The 2nd section gives to the justices and barons authority "to reverse, affirm, or amend any judgment which shall have been given on the indictment or inquisition." In the present case there is neither conviction nor judgment, so that neither the statutory requirement necessary to found the jurisdiction of the Court for Crown Cases Reserved upon, nor the requisite material for the Court to deal with, appear to be in existence. Assuming that this is so, the further consequence seems inevitably to ensue, that the accused can never be convicted on the charge upon which they were indicted at Exeter. Even if the Court for Crown Cases Reserved were to assume jurisdiction over the case as left to them on the findings of the jury, and to come to the conclusion that the jury ought to have brought in a verdict of "guilty," surely it is not for the judges to do what the jury ought to have done, but did not do. From Magna Charta to the present day it is by the verdict of a jury, and by that only, that a man can be convicted; the province of the judges assembled in the Crown Court is statutory—"to reverse, affirm, or amend any judgment," and it is difficult to conceive how any ingenuity of argument could construe these very plain and express words into an enactment enabling the judges to usurp the place of a jury and to find a verdict of guilty. But if the Court for Crown Cases Reserved cannot find the accused guilty, what power can do so within the bounds of the Constitution? The jury empanelled to try these men has been discharged after finding a verdict in accordance with the direction of the presiding judges; they therefore are *functi officio*, and cannot be brought together again to alter, supplement, or amend their verdict. The only other course open to the prosecution would be to indict the accused afresh, and the doubtful legality of such a course would, in all probability, operate as an effectual deterrent against its adoption. Thus the difficulties of the *Mignonette* case seem to be increased rather than diminished by the trial at Exeter. It will be disappointing to the profession and public should the main and momentous question of the case be shelved through the success of a collateral issue on the ground of jurisdiction.—*Law Times*.

Correspondence.

(To the Editor of the Journal of Jurisprudence.)

A COMPLAINT FROM ARBROATH.

SIR,—There are few questions in which a community can have a greater interest than that of the speedy and economical administration of the law. The law's delays, its voracious appetite, and its inaccessibility, have afforded scope for every mood of the author's pen.

We in Arbroath who have had the misfortune to differ with our neighbours, or who from any other cause of duty, expediency, or necessity would wend our way to the forum, can give chapters from our own everyday experience abounding in incidents quite as pathetic and graphic as those which recount the mishaps of Mr. Pickwick, or describe the variable fortunes of Peter Plenderleath. And yet we have as upright and honourable a body of professional men in this our maritime and commercial burgh as can be catalogued in any faculty. Why is it then that, seeing we have an able body of legal practitioners, a resort to the arbitrament of the Sheriff is such a formidable thing? No county could have abler or more conscientious Sheriffs than those high-minded gentlemen who at present grace the judicial bench of Forfarshire. And at no previous time can it be said that the Sheriff Court has been more popular or possessed in a greater degree the confidence of the public than now. Why is it that in all these circumstances we have grievous complaint? The answer is to be found in the fact that we cannot get a decision at our own doors, but must, at enormous expense, besides loss and inconvenience at every turn in the labyrinth of a Sheriff Court process, go by ourselves or our agents to the county town of Forfar—a distance of sixteen miles—before we can reach the presence of the Sheriff, and obtain that which we consider amongst the best blessings of a free constitution—an impartial judgment from an incorruptible Bench.

As you will doubtless have within your editorial reach materials enabling you fully to adjudicate upon our desire for and claim to a seat of Court in Arbroath, we shall be glad to have the benefit of your views and suggestions, and possibly some one or other of your readers may have something valuable to communicate.—I am, etc.,

LITIGANT.

ARBROATH, 28th October 1884.

UNDERGROUND WATER SUPPLY.

SIR,—If legislation is being agitated, a statement of cases in point involving hardship may prove of service.

A railway company obtains its Act to run through a superior's estate 200 yards above a residence, and the well of which has given supply to the household and bestial on the freehold. The railway cutting in rock is 30 feet deep, being precisely on a level with the bottom of the well on the freehold, and with the result that the usual supply hitherto enjoyed is cut off, and not regained until the well is sunk, at the *owner's expense*, some 5 feet, the railway company having denied all liability.

Under the vague and uncertain position of law, the proprietor's agent advised against prosecuting a claim for compensation.

In this case the underground flow seemed doubtless to have been cut, but even that might have been debated on the plea that a dry season may have been the cause of unwonted failure in supply.

There can, however, I think, be no debate on the necessity for a compulsory clause in all Acts granting *concessions* to railway companies to compel these companies at common law to make good all cause of deprivation. As it was, this case gave very great cause of inconvenience, if not danger, and if the population of a village had so suffered, serious danger must have supervened.

ROBERT BARCLAY.

INCHBRAVOCK, MONTROSE, 1st November 1884.

A neighbouring feuwar was put in same position by same operation, and even now (two years since) his well becomes periodically tainted by the solution on the railway sleepers, although, as stated, about 200 yards of *rock* is betwixt the line and his well.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF GLASGOW.

Sheriff MURRAY.

BANK OF SCOTLAND v. WILLIAM GEORGE BROWN AND
WILLIAM COUPER TAIT.

Bankruptcy—Preference—Assignment of the licence and goodwill of a spirit shop in security of advances—Intimation—Held that it was not necessary to constitute a good security that the assignment should be intimated sixty days before bankruptcy—Assignment not reducible under the Act 1696.—The following interlocutor explains the circumstances of the case:—

"Glasgow, 11th August 1884.—Having heard parties' procurators: Finds (1) Robert Brown, publican, Parkhead, executed on 25th May 1882 the assignment, 13-1 of process, to W. G. Brown, auctioneer, Baillieston, whereby he assigned to him his shop and premises, including the goodwill, spirit licence, fixtures, fittings, utensils, and stock-in-trade of the said shop, as a security and guarantee to him for £150, of which £14, 8s. was for an account and £135, 12s. was for cash then advanced, with power to sell and pay himself such amounts or any further sum he might advance: Finds (2) that from the evidence it appears that the £135, 12s. in ques-

tion was advanced at the date of the assignation, and that a further sum of £90 was subsequently advanced on 11th August 1883, and a sum of £18 to pay rent on 15th August 1883, but that an alleged advance of £25 has not been sufficiently proved: Finds (3) that by R. Brown's lease assignees were excluded without the consent of the landlord: Finds (4) that R. Brown getting deeper into difficulties, W. G. Brown at last advertised, as in R. Brown's name, and with his knowledge and consent, the shop for sale, and on 9th August 1883 a Mr. Warton offered W. G. Brown £550 for the business belonging to R. Brown, including fixtures and goodwill, on condition that the landlord accepted him as a tenant, and that the licence was legally transferred: Finds (5) that pending the fulfilment of these conditions stock was taken, and Warton was put in possession by W. G. Brown and R. Brown, who had never left the shop, and the £550 was consigned with the nominal raisers the Bank of Scotland in the joint names of Warton and W. G. Brown: Finds (6) that the landlord at first raising difficulties, his consent was got on 21st August 1883 on a payment of £20 being made to him by W. G. Brown: Finds (7) that the licence was endorsed by R. Brown to W. G. Brown on or about 8th August 1883, and thereafter transferred to Warton, who also paid W. G. Brown £45, 5s. 7d. for the stock-in-trade: Finds (8) that R. Brown was sequestered on 12th September 1883, and the claimant W. Couper Tait was appointed trustee: Finds (9) that the present multiplepounding having been raised, Tait, as R. Brown's trustee, claims the whole sum, and W. G. Brown claims £330 as the amount due to him for his advances, expenses, commission, etc.: Finds (10) that in the course of the case the assignation 13-1 has been stamped: Finds on the whole case and in law—1. That the plea by Tait that the assignation 13-1 is unstamped falls to be repelled in consequence of the subsequent stamping; 2. That *quoad* advances made at the very date of the assignation, or subsequent thereto, the said assignation is not reducible under the Act 1696, even though it be not held to have been completed by intimation or otherwise till within sixty days of bankruptcy; 3. That this does not apply to the £14, 8s. of a prior account, *quoad* which it falls under the Act 1696; 4. That the total amount which the claimant W. G. Brown can demand under his assignation are the advances of £135, 12s. and £90, interest on these two sums, amounting to, say, £19, 12s. 6d., the subsequent advance of £18, certain sums for rent, rates, expenses of sale, amounting in all to £42, and the £20 paid for the landlord's consent, amounting in all to £325, 4s. 6d., from which deducting £45, 5s. 7d. already received by W. G. Brown from Warton for the stock, the balance he can claim on the fund is £279, 18s. 11d. Therefore finds the nominal raisers liable only in once and single payment of the funds *in medio*: Ranks and prefers the said William George Brown *primo loco* to the sum of £279, 18s. 11d., and the claimant William Couper Tait to the balance of the said fund: Decerns against the nominal raisers as holders to pay to the said claimant William George Brown the said sum of £279, 18s. 11d., and to pay the claimant William Couper Tait the balance of the said fund, with interest as craved; and on payment being made as aforesaid, exonerates and discharges the holders from all claims under the action: Finds no expenses due to or by either claimant, and decerns.

(Signed) "A. ERSKINE MURRAY.

" *Note*.—There can be no doubt that an assignation in respect of money lent at the time, or to be thereafter lent to a bankrupt, is good even if not completed till within sixty days before bankruptcy. Even were the assignation itself within sixty days of bankruptcy, this is true. The principle as laid down by the Court of Session in the old case of *Johnstone v. Home*, M. 1130, of which there are three reports, of which the last is by Lord Kilkerran, is that the bankrupt, however notour bankrupt, retains the power of borrowing money and granting securities for the same, and that therefore the statute 1696 cannot be held to apply to *nova debita*, but only to antecedent debts. The same doctrine is laid down by Professor Bell in his *Commentaries*, as applying to moveables. Therefore if the assignation now in question was completed at any time before bankruptcy, so as to carry away the property out of the estate of the bankrupt, that was sufficient.

" But the question remaining is, whether the assignation in the present case was ever completed at all. An assignation of tangible moveables is completed by delivery; an assignation of a debt is completed by intimation to the debtor; an assignation of a lease must be intimated to the landlord. There are some assignations, that of a patent, which cannot be intimated at all. The principle of law seems to be, that if there is any person that has a right to question an assignation of an incorporeal right, intimation to him is necessary, and is sufficient to complete the right.

" Now in the present case the assignation was one of stock, fixings, and goodwill. The stock subject to the assignation soon vanished, and the fixings were certainly tangible moveables, which required delivery, and it is clear from the evidence that no delivery was ever given, for R. Brown remained really in possession till Warton took possession. But the goodwill, which formed the principal part of the value for Warton's £550, was intangible until realized. It is difficult to say how such an assignation could be completed. It is not a case where in the usual sense actual delivery could have been taken. Neither, properly speaking, was it like a debt. In itself it did not depend on the action of any third party, if the lease had not been one excluding assignees. But as it was, such a clause existing, the validity of the assignation depended on the consent of the landlord, and therefore, on the principle formerly stated by the Sheriff-Substitute, intimation was what was required to complete the assignation. Now there was no formal written intimation to the landlord at all; there was verbal intimation to the landlord within the 60 days, and on 20th August, about three weeks before bankruptcy, the landlord's agent gave his consent in respect of the payment of £20; of that date at least the assignation must be held to have been intimated and thus completed. Therefore, though completed within the 60 days, it was good in so far as it conveyed the goodwill in security of loans advanced at the date of the assignation or thereafter advanced.

" The case of the *Heritable Securities Investment Association, Limited*, Wingate & Co.'s trustee, was cited for the claimant Tait. In that case Wingate & Co. had granted to the Heritable Securities Investment Association, Limited, for an advance of £55,000, an *ex facie* absolute disposition of a shipbuilding yard which the Heritable Securities Investment Association, Limited, then leased to Wingate

& Co. for ten years at a rent about three times the real yearly value, and a personal bond was granted by the borrowers to the lenders, and an agreement made whereby the absolute disposition was declared a security, and it was provided that no demand should be made both for the payments under the bond and the rent, and all sums paid as rent should be credited under the bond. This the majority of the Court of Session, Lord Young *dissentiente*, characterized as an illegal device to make a security by hypothec in a way which the law could not recognise. But it seems to the Sheriff-Substitute that the disposition of a heritable property by a party retaining the possession thereof under a sham lease, granted for the purpose of increasing the lender's security by hypothec, is a very different thing from the assignation of an intangible right, and is not necessarily ruled by the same principles.

"As to the details, the stock which fell under the assignation was long since disposed of, and no possession of the fixtures was ever properly speaking taken by W. G. Brown at all. But no question arises under these heads, the goodwill alone completely covering W. G. Brown's advances. The £25 advance was not sufficiently proved. The Sheriff-Substitute would hardly have been inclined to allow the £27, 10s. for auctioneer's commission, as by W. G. Brown's account he was only selling what was his own, had it not been for the terms of the assignation; anyway the commission should in the circumstances cover the minor expenses of sale. (Intd.) "A. E. M."

The decision was acquiesced in by both parties.

Wallace & Wilson, writers, Glasgow, for William G. Brown;
Borland, King, & Shaw, writers, Glasgow, for Robert Brown's trustee.

SHERIFF SMALL DEBT COURT, GLASGOW.

Sheriff GUTHRIE.

DAVID WATSON v. THE SINGER MANUFACTURING COMPANY.

Landlord's hypothec—Sewing machine let for hire—Plenishing of shoemaker's shop.—Held that a sewing machine let on hire to a shoemaker, which formed the most important article in the premises, being three-fourths in value of the sequestrated effects, was not subject to the landlord's hypothec.

This was a small debt action raised at the instance of David Watson, house factor, 482 Paisley Road, Glasgow, against The Singer Manufacturing Company, for payment of the sum of "£6, 13s. 4d., being the loss, injury, and damage sustained by the pursuer, who is proprietor of shop, 298 Cathcart Road, Glasgow, in consequence of the defenders having, on or about the 29th day of August 1884, illegally and unwarrantably removed a sewing machine from the said shop let by the pursuer to William Shenton for the year from Whitsunday 1884 to Whitsunday 1885 at the rent of £20 per annum, the said machine having been sequestrated at the date of removal, and forming the greater part of, and being subject to, the hypothec of the pursuer."

The case was some time ago fully debated before Sheriff Guthrie, who

took the matter to *avizandum*, and on the 30th October 1884 he pronounced the following decision:—

“Questions as to the liability of sewing machines held on the ‘hire and purchase’ system, and hired pianofortes, to the landlord’s hypothec have been very frequent in the Sheriff Courts, and there has been so uniform a course of decisions on the subject that I should consider it to settle the practice until disturbed by a judgment of the Supreme Court, even if I were not satisfied that my colleagues had judged rightly in principle. I have been referred to *Milne v. The Singer Company* (Sheriff Barclay), *The Singer Company v. Docherty* (Sheriff Birnie), *Stevenson v. Donaldson* (Sheriff Lees), and the *Wheeler & Wilson Company v. M’Ritchie & Bruce*, besides various unreported cases. The rule founded on the landlord’s right to have his house or shop ‘plenished’ by his tenant with the ordinary and necessary furniture for the purpose for which it is let is that hired furniture or plant of this description brought upon the premises is subject to hypothec for rent just as if it were the tenant’s property, the owner being held to take the hazard of the rent. The decisions referred to concur in making an exception to the rule where a specific article or articles, not being ordinary and necessary parts of the plenishing of a dwelling-house are let on hire. In such a case the landlord is not presumed to have relied on these as being subject to his hypothec, and the owner of it cannot be thought to have taken the hazard of the rent. In the case before me the sewing machine in question was hired to the tenant of a shop, and was used for the purpose of repairing shoes in a trade which he carried on, and Mr. Wilson ably contended that there was thus a different question from that which was dealt with in the Sheriff Court cases which I have cited, especially as the schedule shows that the machine was the most important article in the premises, being three-fourths in value of the sequestrated effects. He maintained that the case thus came to be identified in principle with *Nelmes & Co. v. Ewing*, November 23, 1883, 11 R. 193, where it was held that a hired billiard table and appurtenances were subject to hypothec for the rent of a billiard saloon. I confess that this argument is not without force, and that if I were satisfied that a machine such as that in question is an ordinary or necessary part of the furnishing of a shoe-mending shop, I should, if that were the whole case, find it difficult to distinguish this from *Nelmes & Co. v. Ewing*. In that case the important point was that the premises were let as a billiard saloon, and that all, or nearly all, the ordinary furnishings were hired, so that the case was identical in principle with the early cases in which the furniture of houses was hired in slump from dealers. Here it is not proved, and I cannot assume that a sewing machine is an ordinary or necessary part of a cobbler’s plant, which a landlord is entitled to rely on his possessing. But there is another element in this class of cases which I cannot altogether disregard as a ground of judgment—I mean the notoriety of the practice of hiring sewing machines and pianofortes. In England the validity of such contracts against creditors in bankruptcy depends on the existence of a custom (see *e.g. Crawcour v. Satter*, 18 Ch. D. 30; 51 L. J. Ch. 595); and while it is clear that a mere general practice of tradesmen could not, as was held in the case of furniture-brokers selling on hire the whole furniture of a house, be allowed to abrogate the rule

of law that a landlord may insist on having his house 'plenished,' I am bound to notice the existence of such a notorious custom in regard to this particular article, and it satisfies me that there is at least no injustice, as I think there is no violation of legal principle, in holding that the machine in question was not subject to the pursuer's hypothec. I have only to add that no question was raised as to the property in the machine, such as occurred in *Cropper v. Donaldson*, *Hogarth v. Smail's Trustee*, and other recent cases in the Court of Session, so that I have to decide only the question as to the hypothec over hired moveables."

Act. Wallace & Wilson, writers, Glasgow—*Alt.* T. C. Young & Son, writers, Glasgow.

SHERIFF COURT, DINGWALL.

Sheriffs HILL and MACKINTOSH.

MACKAY v. MACKENZIE.

"*Dingwall*, 22nd August 1884.—The Sheriff-Substitute having heard parties' procurators on the defenders' preliminary pleas, sustains the first of said pleas, therefore dismisses the action: Finds the pursuer liable in expenses; allows an account thereof to be given in, and remits the same when lodged to the Auditor of Court to tax and report.

(Signed) "CRAWFORD HILL.

"*Note.*—The principal defender is proprietor of the estate of Brahan in this county, and the pursuer has been head gamekeeper on the estate for 20 years previous to Whitsunday last, when, it is alleged, he was unjustly dismissed. In the present action he claims a year's wages after that date, on the ground that he had no notice that his services were then to be dispensed with. The first defence is no jurisdiction, and that is the only question at present dealt with.

"The pursuer maintains that there is jurisdiction both *ratione domicilii* and *ratione contractus*.

"1. The Sheriff-Substitute is satisfied that jurisdiction cannot be sustained here *ratione domicilii*. He apprehends that to found jurisdiction on the ground of *domicilii* there must either be actual residence within the territory for 40 days, or in the case of a proprietor of an estate with a dwelling-house on it, that dwelling-house must be his occasional residence, and be occupied during his absence by his family or servants. Now here the facts are quite different. The defender has, indeed, an estate and a dwelling-house on it within this county; but since he became proprietor, three years ago, he has never lived in the house. He has been for several years, and is at present, in India, and the house has for many years past been let, and is now occupied, not by his family or servants with a view to his own occasional residence there, but simply by a servant to look after it until it shall be again let. There is here simply ownership, or heritable property within the county, but nothing whereon to found jurisdiction on the ground of domicile.

"2. *Ratione contractus.*—The contract founded on was made and was to be enforced within the county. So far there is a good basis

for jurisdiction on the ground of contract. But it has always been held that these circumstances were not sufficient to found jurisdiction unless combined with the personal presence of the defender within the territory at the time the summons was served. *Wylie v. Laye*, 11 July 1834, 12 S. 927; *Sinclair v. Smith*, 17 July 1860, 22 D. 1480; *MacBay v. Knight*, 22 November 1789, 7 Rettie, 251. Some observations by the Lord Justice-Clerk (Inglis), in *Sinclair v. Smith*, were quoted at the debate as showing that the defender's presence in the territory was unnecessary; but his observations do not warrant the inference which is attempted to be drawn from them. All that he says is that *personal citation* is unnecessary when jurisdiction can be founded on domicile, but wherever jurisdiction is to be founded on contract he expressly says: 'It is *presence within the territory* when the summons is served that is the important fact combined with Scotch origin or Scotch contract to found jurisdiction.'

"If, then, presence within the territory be required, it is scarcely necessary to say that the argument founded on 39 and 40 Vict. c. 70, sec. 9 as to edictal citation has no force. There must be jurisdiction before it can be rendered operative by citation, and no citation, however good in itself, will make up for what is wanting to found jurisdiction. All this has reference to the principal defender. But it was admitted at the debate that the defenders must stand or fall together. And accordingly the action has been dismissed as against all. (Intd.) C. H."

"*Edinburgh, 13th October 1884.*—The Sheriff having heard parties' procurators on the pursuer's appeal, recalls the interlocutor appealed against, repels the defenders' first plea in law, and remits to the Sheriff-Substitute to proceed with the cause.

(Signed) "W. MACKINTOSH.

"*Note.*—The Sheriff is of opinion that upon the admitted facts of this case jurisdiction exists *ratione domicilii*. He cannot regard Major Mackenzie of Seaforth as a foreigner, or as domiciled elsewhere than in the county of Ross. It is true that since his succession he has been absent on military duty in India; but besides being owner of the estate of Brahan, and carrying on the home farm of that estate, he has within the county a furnished mansion-house, which when not let is occupied by his servants, and which has long been the fixed abode of himself and his family. In short, while he has not since his succession personally occupied Brahan Castle, it is nevertheless his principal, and indeed his only residence, and that being so, the Sheriff thinks that he is domiciled in the county of Ross.

"If this be so, it is unnecessary to decide the important and somewhat difficult question whether, apart from domicile, jurisdiction exists *ratione contractus*. It is admitted that the contract sued on was made and fell to be performed within the county, but the Sheriff had an interesting argument upon the question, whether in order to found jurisdiction on this ground personal citation within the county is essential. If it had been necessary to form an opinion upon that question, the Sheriff would have been inclined to hold, as appears to have been held in other Sheriff Courts, that at all events where property is possessed within the county,

and the Court has thus the means of making its decree effectual, there is no necessity for personal citation; see *Ersk. i. 2. 20*; *Voet ad Pandectas*, v. 1. 7. 3. But, as has been said, it is not necessary to decide this question at present. (Intd.) W. M."

Act. Wm. Mackenzie—Att. Smith & Duncan.

SHERIFF SMALL DEBT COURT, PAISLEY.

Sheriff COWAN.

THE GLASGOW TRAMWAY AND OMNIBUS COMPANY, LIMITED,
v. HENRY MAVOR.

Reparation—Wrongous information—Malice, and want of probable cause.—A private party lodged a charge or complaint with a policeman against the pursuers, charging them with having cruelly ill-treated, abused, or tortured a horse, the property of the Tramway Company, which charge was afterwards dismissed. In an action for reparation, held that the defender had in the circumstances been guilty of such recklessness in giving the criminal charge as to amount in law to malice, and damages given accordingly.

This is a small debt action at the instance of the Glasgow Tramway and Omnibus Company, Limited, and John Duncan, secretary and manager, and Terence Meichan, driver, against Henry A. Mavor, electric engineer, residing at 19 Maxwell Drive, Pollokshields, for payment of the sum of £5, 5s. sterling, as loss and damage sustained by the pursuers in consequence of the defender having, on or about the 5th day of September 1884, wrongfully, illegally, maliciously, oppressively, and without probable cause, lodged, or caused to be lodged, a charge or complaint in the Central District Police Office, Glasgow, or with a policeman attached to said Central District Police Office, against the pursuers, charging them, or one or other of them, with having on or about said date, in or near Argyle Street, Glasgow, cruelly ill-treated, abused, or tortured, or caused or procured to be cruelly ill-treated, abused, or tortured, a horse or other animal, the property of the said John Duncan, or of the said Glasgow Tramway and Omnibus Company, Limited, and then and there under the charge of the said Terence Meichan, by working said horse or other animal yoked to an omnibus, or other stage carriage, while suffering from an open sore or wound in breast or neck, upon which charge the pursuers were served with a police complaint charging them with the above offence, and requiring them to appear before the sitting magistrate in the Central District Police Court, South Albion Street, Glasgow, on Tuesday the 23rd day of September 1884, at 10 o'clock forenoon, to answer to the said complaint, which the pursuers accordingly did, and after evidence had been led the sitting magistrate dismissed the complaint, by all which the pursuers have sustained loss and damage, or expense to the extent of £5, 5s. A proof was led, and in the evidence given on behalf of the pursuers it was stated that when the charge was made there was no open sore on the horse, but that part of the hair on the breast had been rubbed off, leaving the skin bare.

This had been caused by reddish matter applied to produce a blister, which had run down from a slight enlargement on the near side of the shoulder. Defender said he noticed the horse at the foot of Buchanan Street, and remarking to a policeman that it was bleeding much about the breast, asked him how he allowed it to be driven about in that state. He left his card with the policeman, expressing his willingness to appear as a witness, but lodged no charge himself. He took no steps to ascertain whether the animal was really suffering from a sore or not, and took no further action in the matter till he gave evidence against the Tramway Company in the Central Police Court. Two policemen, who examined the horse in Argyle Street after the defender left, stated that they found a large sore, with the harness working upon it, on the left breast. Ten witnesses for the pursuers, who examined the horse, testified that it had no broken skin upon it, and was quite fit for work. Mr. Aitken, writer, Glasgow, for the defender, maintained that his client was not the cause of the prosecution; he merely called attention to the matter, and the policeman in bringing up the case acted on the evidence of his own senses. The action was a gross example of oppression, unworthy of, and disgraceful to, the company which instituted it, and which ought to know better. Their motive was evidently to deter citizens from doing a duty of humanity clearly incumbent upon them. The Sheriff said he was satisfied the charge was quite untrue. The defender made no examination to satisfy himself that his impression regarding the state of the horse was correct, and he considered that he had acted recklessly in involving a public company such as the defenders in a criminal charge. His conduct was such as to infer malice, and he therefore gave decree in favour of the pursuers for the sum sued for, with £2, 3s. 4d. of expenses.

Act. Wallace & Wilson, writers, Glasgow—*Alt.* Malcolm & Aitken, writers, Glasgow.

Notes of English, American, and Colonial Cases.

SHIP AND SHIPPING.—*Merchant Shipping Act*, 1854 (17 and 18 Vict. c. 104), s. 172, *etc.*—*Penalty—Withholding seaman's certificates—Compensation—Right of action apart from Statute.*—The Merchant Shipping Act, 1854, ss. 172 and 524, imposes a penalty not exceeding £10 upon any master of a ship who fails to sign and give a certificate of discharge to a seaman specifying the period of his service and the time and place of his discharge, such penalty to be applied, if the Justices think fit, in compensating any person for any wrong or damage which he may have sustained by the act or default in respect of which such penalty is imposed.—*Vallance v. Falle*, 53 L. J. Rep. Q. B. D. 459.

The plaintiff, a seaman, brought an action against the defendant, a master of a ship, for damages sustained through the defendant's withholding a certificate of discharge:—*Held*, that the action was not maintainable, inasmuch as the duty was created for the first time by 17 and 18 Vict. c. 104, s. 172, and a particular remedy was conferred by that statute.—*Ibid.*

MASTER AND SERVANT.—*Employers' Liability Act, 1880 (43 and 44 Vict. c. 42), s. 1, sub-s. 1, s. 2*—*Defect in condition of plant.*—The Employers' Liability Act, 1880 (43 and 44 Vict. c. 42), gives a workman a right of action against his employer for personal injury caused by reason of any defect in the condition of the works, machinery, or plant connected with or used in the business of the employer which arises from the negligence of the employer. This provision applies to works and plant consisting of a combination of several pieces of plant, each of which is in itself sound and fit for use, but which when combined form unsound and defective plant, so that injury is caused to a workman using it. *Cripps v. Judge* (App.), 53 L. J. Rep. 53 Q. B. D. 517. *Heske v. Samuelson* (ante, p. 45) approved—*Ibid.*

MASTER AND SERVANT.—*Pleading—Defect causing injury to servant—Knowledge of master—Ignorance of servant—Negligence.*—In an action by a servant against his master for injuries sustained by him in the course of his employment by reason of the defective condition of the machinery which the servant has to use, or of the premises upon which he has to work, or of the means by which the service is to be fulfilled, the statement of claim must allege, not only that the master knew, but also that the servant was ignorant of the danger which was the cause of the injuries sustained. *Griffiths v. The London and St. Katharine Docks Co.* (App.), 53 L. J. Rep. Q. B. D. 504.

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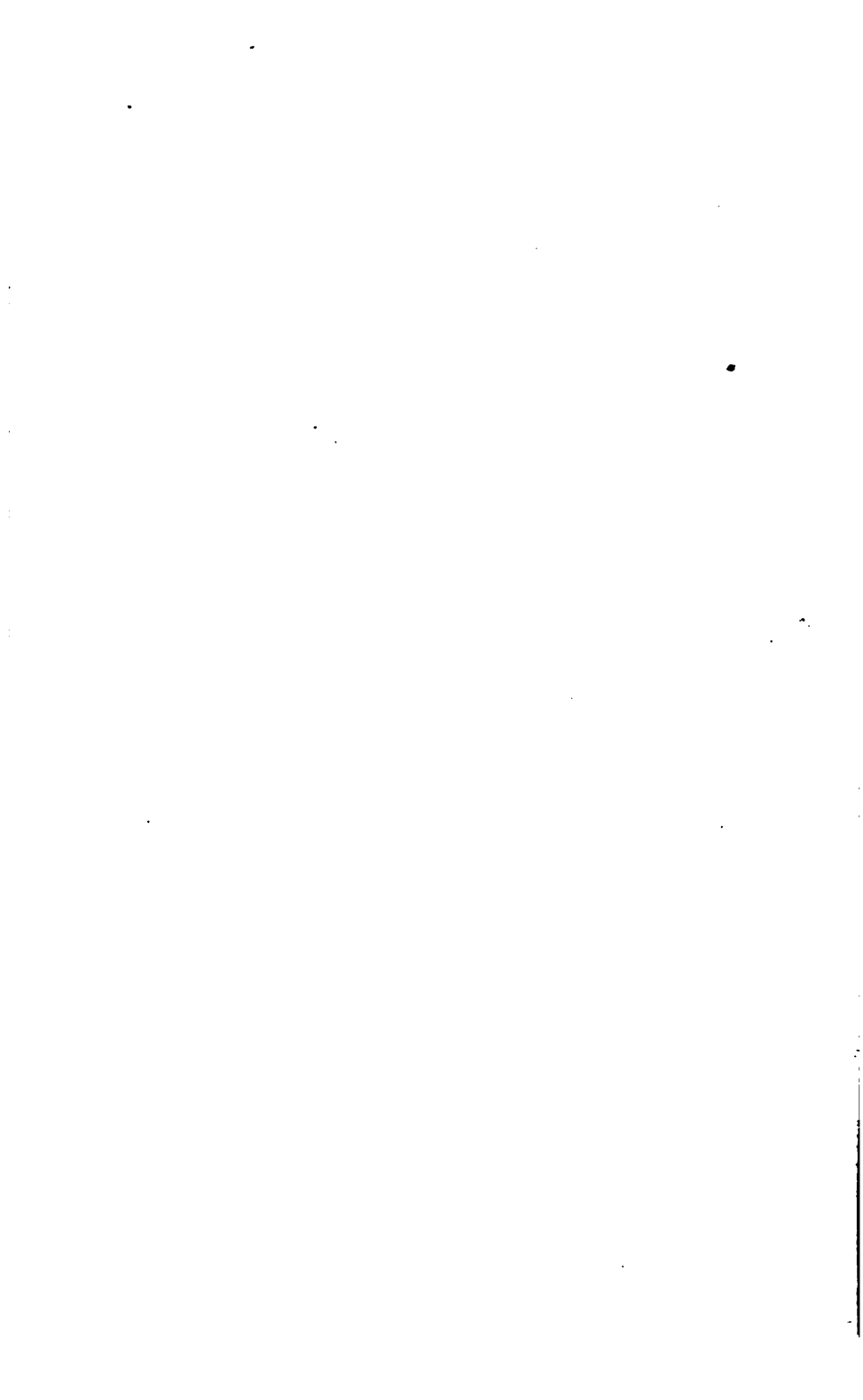
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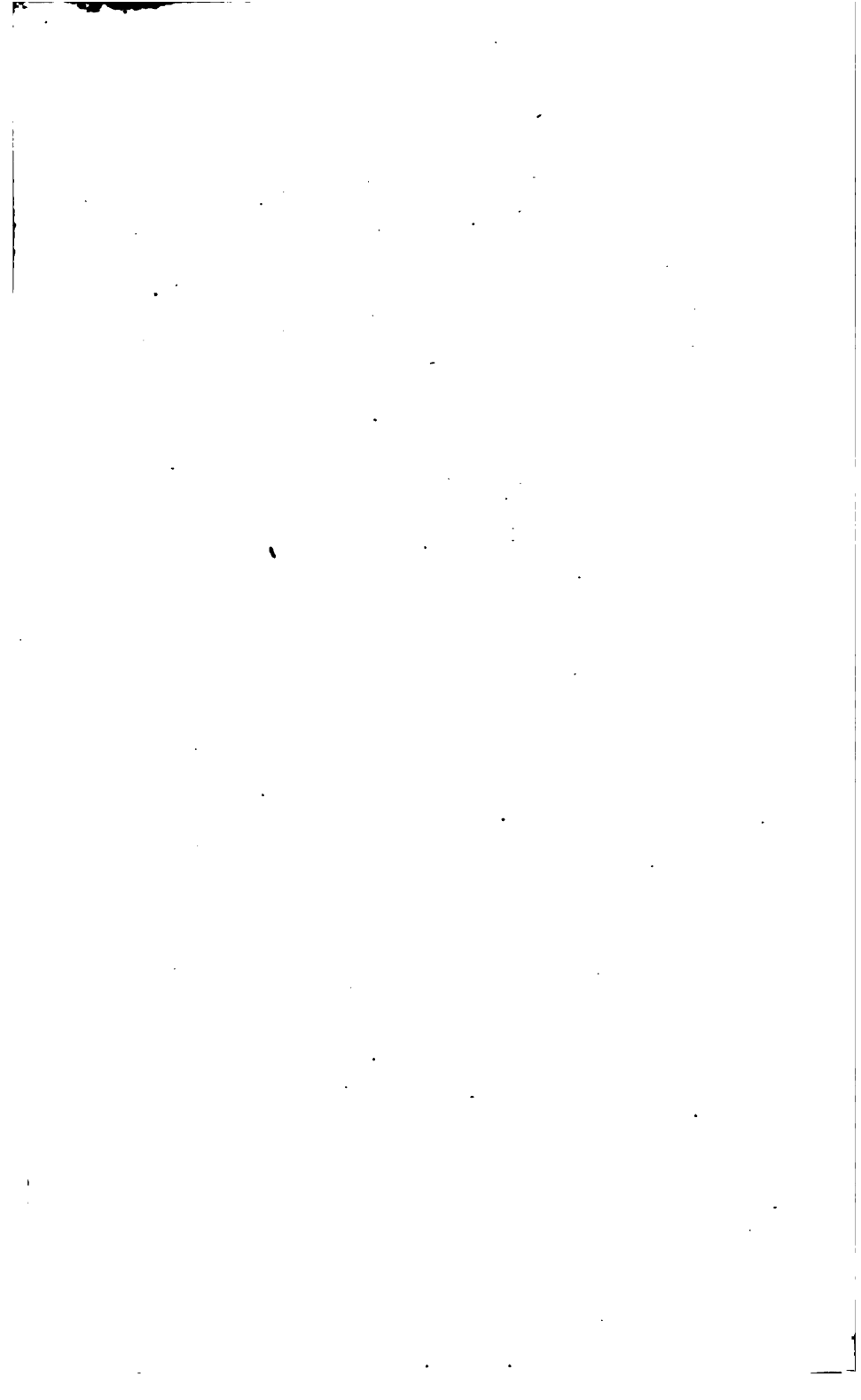
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